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# In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-923

OLINKRAFT, INC.,

Petitioner

versus

MARY EVELYN CLARK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Olinkraft, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on August 4, 1977.

## OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals in this case is reported at 556 F.2d 1219, 15 FEP 374 (5th Cir. 1977), and is set forth at Appendix "A" hereto.

The order of the Fifth Circuit Court of Appeals denying rehearing and rehearing *en banc* is unreported and is set forth at Appendix "C" hereto.

The judgment by the United States District Court for the

Western District of Louisiana dismissing respondent's complaint is unreported and is set forth at Appendix "E" hereto. All Appendices are bound separately and filed together with this petition.

## JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1) pursuant to the August 4, 1977, opinion of the Fifth Circuit Court of Appeals reversing and remanding the December 8, 1975, dismissal of respondent's complaint by the United States District Court for the Western District of Louisiana upon which judgment was entered on December 15, 1975, and pursuant to the November 7, 1977, denial of petitioner's petition for rehearing and rehearing *en banc* by the Fifth Circuit Court of Appeals.

## QUESTION FOR REVIEW

Is a Charge of sex-based promotion discrimination, filed with the Equal Employment Opportunity Commission more than one hundred eighty days after any denial of promotion and more than one hundred eighty days after discontinuance of a prior, allegedly discriminatory promotion system, timely under § 706(e) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(e) and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L.Ed. 2d 571 (1977)[1] because present adverse effects of promotion denials under the prior system "toll" the statutory limitations period and establish a "continuing violation"?

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1. The decision of the Supreme Court in this case will be hereinafter referred to as the *Evans* decision.



## STATUTORY PROVISIONS INVOLVED

Section 706(e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e- 5(e) reads in pertinent part as follows:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter. . . .

Rule 12(b) and 56 of the Federal Rules of Civil Procedure are set out in their entirety at Appendix "F" hereto.

## STATEMENT OF THE CASE

Although somewhat obfuscated by the gyrations of the Appeals Court's majority in reaching reversal in this case, the proceedings and facts underlying this action are simple and uncontroverted. Only in their misapplication in conflict with *Evans* is complexity encountered.

Respondent Clark (plaintiff below) is a female employee of Olinkraft, Inc. (defendant below). She was hired on March 12, 1964. On March 5, 1975, she filed a charge with the Equal Employment Opportunity Commission alleging that petitioner had unlawfully discriminated against her be-

cause of her sex by denying her promotions.[2] After investigation, the EEOC issued a July 23, 1975, determination that no reasonable cause existed to believe Title VII had been violated in regard to respondent's promotions. (App. G, pp. A-27-28.) This action was filed on October 15, 1975. The complaint (App. "G") alleges that in the spring of 1964 and continuing for an unspecified period of time thereafter that petitioner had a "policy or practice" of promoting males with less seniority over qualified females to better paying jobs and that petitioner continues to maintain such a policy or practice. Respondent further alleged that between her initial employment on March 12, 1964, and her promotion to roll tender on October 1, 1974,[3] less senior males were promoted ahead of her and that petitioner "continues" to engage in such activity.

Petitioner filed a motion to dismiss the complaint on November 7, 1975, with attachments which established certain facts upon which dismissal was urged. (App. "H".) This

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2. This charge is found at Appendix "H", pp. A-33-36. The appendix also contains a copy of the promotional progression established by the then current labor agreement in plaintiff's department. (App. "H", p. A-52). Under this system of progression, plaintiff was eligible to be promoted in sequence from feeder-grabber to roll handler to press operator helper to press operator. That appendix also shows that tenure within each of these job classifications leads to automatic hourly pay increases commonly referred to as "step increases." This is significant because it is actually this pay system concerning which Ms. Clark complains when she alleges that less senior male employees received greater promotional and pay benefits than did she.

3. The actual date of this promotion is established by the company's records as being September 8, 1974. (App. "H", p. A-45.) Respondent admits on deposition that the records would most accurately reveal the true date. (App. "J", p. A-108.) The exact date is not material, however, in the context of the issues of this case.



motion was founded on Rule 12(b), Federal Rules of Civil Procedure, and, at paragraph 4, tracked the language of Rule 12(b)(6) and urged judgment on the basis that the complaint failed to "state a claim upon which relief can be granted.... because all allegations....are based on facts and events which occurred more than one hundred eighty days prior to March 5, 1975, which was the date of the filing of her charge of employment discrimination...." Petitioner filed its answer and attachments on November 10, 1975 (App. "I"), and on December 2, 1975, the sworn deposition of respondent was taken. (App. "J".) The deposition was filed into the record on December 4, 1975.

Oral argument was held on petitioner's motion on December 8, 1975. The trial court sustained petitioner's motion and its December 15, 1975, judgment was tantamount to a grant of summary judgment.[4]

There is no material fact in dispute in this case. Respondent as a deponent was unable to specify any time, place, event or set of circumstances within one hundred eighty days showing she had been denied a promotional opportunity. Respondent submitted no response setting forth any specific fact in contravention of the material facts upon which petitioner relied. Those material facts are as follows:

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4. Argument was confined to the summary judgment issue after respondent's concession that the claims asserted under 42 U.S.C. §1981, 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments to the S. Constitution were not within the subject matter jurisdiction of the court as a matter of law. This resolved the Rule 12(b) (1) portions of petitioner's motion and left only the 12(b) (6) portion of said motion for contention. All extraneous facts in the record were before the court this day and the proceedings thereafter, regardless of labels, were conducted under Rule 56, Federal Rules of Civil Procedure.

1. Petitioner hired respondent on March 12, 1964.

2. On August 12, 1974, the company instituted a remedial seniority system which gave an "affected class" of females hired prior to July 2, 1965, the right to compete for promotions based on their total company seniority. (This system is referred to as the female "AC" Agreement and appears at appendix "I", pp. A-64-A-72.)

3. Respondent was a member of the affected class of employees under this agreement.

4. Respondent worked as a feeder-grabber until September 8, 1974,[5] when she was promoted to roll tender by operation of the "AC" Agreement.

5. Respondent was promoted to press operator helper on October 7, 1974 by operation of the "AC" Agreement.

6. Respondent was promoted to press operator on August 9, 1975, by operation of the "AC" Agreement.

7. After the August 12, 1974, "AC" Agreement, respondent was never denied a *promotion* to a job to which she was entitled.[6]

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5. This date is established by the company records and respondent clearly stated on deposition that she did not know the exact date of her promotion and the company records would be the best evidence of the exact date. (App. "J", p. A-108, p. A-140.)

6. The Fifth Circuit's reversal in part relies on its creation of a "disputed issue of fact" by its reading of "the allegations of the complaint and the deposition." (App. "A", p. A-10, f.n.9.) This finding was volunteered regardless of the understanding of all parties at all prior stages of this litigation that the issue was whether petitioner was entitled to judgment as a matter of law. Unfortunately, this obvious afterthought by the court below requires confrontation in this petition for certiorari. Said holding relies on incorrect interpretations of law as will be shown by petitioner's argument at a subsequent section of this petition.



8. Respondent's complaint is premised entirely on the contention that she should have received earlier promotions and been making more money and was precluded from doing so by the promotion system in effect prior to August 12, 1974. She has no quarrel with the female "AC" Agreement or its operation in regard to her promotions.

The trial court decided without opinion that in the absence of specific facts showing the existence of a system of discrimination or the occurrence of an act of discrimination within the statutory period, dismissal was proper. Respondent entered an appeal to the United States Court of Appeals for the Fifth Circuit.

A three judge panel of the Fifth Circuit Court of Appeals, Judge Coleman dissenting, reversed and remanded the trial court's judgment in an August 4, 1977, decision. Petitioner timely filed a request for rehearing and request for rehearing *en banc* which was denied by the court's November 7, 1977, order. (App. "C".) A motion for stay of mandate was granted to petitioner on November 11, 1977, and mandate was stayed until December 22, 1977, by order of the Court of Appeals. (App. "D".) This petition for writ of certiorari follows.

In the majority opinion, the Circuit Court declared that "(t)his appeal raises the increasingly litigated question, what constitutes a continuing violation of the Act for purposes of tolling the running of the one hundred and eighty day period." In resolution of this question, the court held that plaintiff's "allegations...are sufficient to toll the running of the one hundred eighty day period; here discrimination in

promotion and pay continues" and that "(t)he allegations of the complaint and testimony in the deposition show that continuing discrimination is under attack" and "appellant's action is not time barred."

Despite the above language, and despite drawing precedential value from the now overruled *en banc* decision of the Seventh Circuit Court of Appeals in *Evans v. United Air Lines*[7] as "recent support" for an "expansion" of the "seriously disputed" theory of "continuing violations," the majority opinion culminated by stating that it need not reach the question decided by the Supreme Court in *Evans* because there existed a "critical disputed factual question" rendering summary judgment inappropriate. Thus, although neither party contradicted by specific factual material any evidence nor urged any factual dispute in brief or argument, the majority opinion *sua sponte*, avoided the doctrine of *Evans*[8] by its creation of a factual issue. In so doing, the court blatantly expanded the continuing violation theory, despite *Evans*, and reopened a Pandora's box of uncertainties in relation to the application of the limitations period established at 42 U.S.C. § 2000e-5(e). Unless overturned by the Supreme Court, the decision below reestablishes the validity of raising a challenge to a presently neutral employment system for use as a conduit to reach events or systems of alleged discrimination which ceased to exist more than one hundred eighty days before the EEOC charge was filed. Thus, the question supposedly interred by *Evans* is exhumed.

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7. 534 F.2d 1247 (7th Cir. 1976).

8. Issued after oral argument before the panel but before rendition of the Fifth Circuit's August 4, 1977, decision.



## REASONS FOR GRANT OF THE WRIT

The decision of the majority of the panel in this case raises compelling reasons which require the grant of the writ requested.

First, the decision of the Court of Appeals directly conflicts with the holding of *Evans* in that it bares for attack acts which occurred and systems which existed only in excess of one hundred eighty (180) days prior to the filing of a "Charge of Discrimination" with the EEOC. *Evans* plainly insulates such a past act or prior system from attack as "an unfortunate event in history which has no present legal consequences."

Second, as observed by the majority of the panel in this case, the issue on the timeliness of charges under § 706(e) of the Act is a recurring and "increasingly litigated" one involving an important question of statutory interpretation. The decision of the majority of the panel in this case exposes to attack virtually all collectively bargained for seniority systems which historically may have disadvantaged a minority group even where the system has been abolished and a remedial system has been adopted in its place. The legacy of the Circuit Court's opinion will be continued and protracted litigation of pre-*Evans* issues of timeliness and corresponding delay in the resolution of Title VII claims in direct contravention of the national goals favoring the speedy resolution of Title VII claims and elimination of employment discrimination.

Third, the decision of the majority of the panel in this case conflicts with decisions of the Courts of Appeals in *De Graffenreid v. General Motors*, 558 F.2d 480 (8th Cir. 1977);

and *Cates v. Trans World Airlines*, 561 F.2d 1064, (2nd Cir. 1977).

Fourth, the decision of the majority of the panel in this case is contrary to the decisions of the panels of the Court of Appeals for the Fifth Circuit in *McMonigle v. Delta Airlines, Inc.*, 556 F.2d 1261 (5th Cir. 1977) and *Cutliff v. Greyhound Lines, Incorporated*, 558 F.2d 803, 805 f.n. 5 (5th Cir. 1977).

Fifth, the decision of the majority of the panel misapplies Rule 56, FRCP, in that it allows avoidance of summary judgment in Title VII claims by allowing charging parties to rest upon allegations rather than requiring them to produce specific facts showing a genuine issue for trial.

## ARGUMENT

1. The decision of the Fifth Circuit Court of Appeals directly conflicts with the rule enunciated by the U.S. Supreme Court in *United Air Lines v. Evans.*

The Court of Appeals did not apply the timeliness principle mandated in *United Air Lines v. Evans*, supra, in its decision in this case. The contention of the plaintiff in *Evans* is virtually identical to the complaint of respondent herein. The Court stated in *Evans* that although "(r)espondent recognizes that it is now too late to obtain relief based on an unlawful employment practice which occurred in 1968....(s)he contends...that United is guilty of a present continuing violation of Title VII and therefore her claim is timely." The Court below purported to decide the question of "what constitutes a 'continuing violation' of the Act for



purposes of 'tolling' the running of the one hundred eighty day period."

In *Evans*, as in the case at hand, the facts established that the system causing the original prejudice to plaintiff had ceased to exist more than one hundred eighty days prior to the filing of her charge. In *Evans*, as in the case at hand, no definable adverse act of employment discrimination was shown by plaintiff to have occurred within one hundred eighty days of the date of plaintiff's EEOC charge. In *Evans*, as in the case at hand, the plaintiff's presentation of her opposition to summary judgment relies solely on her emphasis of "the fact that she alleged a *continuing violation.*"

Unless its own statement of the issue is ignored, the Court of Appeals decided the issue of the case at hand contrary to the dictates of *Evans*. The opinion below is initiated by the Court's unqualified statement that "(t)his appeal raises the increasingly litigated question of what constitutes a 'continuing violation' of the Act for purposes of 'tolling' the running of the one hundred eighty day period." In deciding this question the Circuit Court relied on the finding in *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 348 (10th Cir. 1975), that a failure to promote "invariably arises during a lengthy period of time" and when alleged, is sufficient to toll the running of the one hundred eighty day period.[9] The Supreme Court decision in the *Evans* case addressed the question of "continuing violations" in the following context:

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9. *Evans* involved a failure to promote issue in that denial of plaintiff's back seniority disadvantaged her in matters of wages, vacations, layoffs and recalls and flight selection. All these matters are vestiges of higher rank in the airline industry. The greater wages respondent herein seeks signal an accruement of higher rank in the normal industrial situation and she claims entitlement thereto only by virtue of the petitioner's

> (Plaintiff) contends...that United is guilty of a present continuing violation of Title VII and therefore that her claim is timely. She advances two reasons for holding that United's seniority system illegally discriminates against her: first, she is treated less favorably than males who were hired after her termination in 1968 and prior to her reemployment in 1972; second, the seniority system gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination. Neither argument persuades us that United is presently violating the statute. (footnote omitted.) 52 L.Ed. 2d 571, 577-578.

In *Evans*, the continuing violation theory was resolved by the Supreme Court as follows:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within 90

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(Footnote 9 - continued)

alleged failure to promote her under the pre-August 12, 1974, promotion system. As almost any employee in this country's work force knows, a promotion occurs upon the event or act of raising an employee to a higher position or rank. A denial of promotion occurs upon the employer's refusal to so elevate an employee and is signaled by either the elevation of another employee or the elevation of none to a job vacancy. Said rejection is an easily identifiable act. The point is that in both *Evans* and the case *sub judice* there is no identifiable act, event or system of disadvantages existing within one hundred eighty days of the charge; all disadvantages are present "effects" of past acts of alleged discrimination.



> days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Respondent emphasizes the fact that she alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and finge benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She

> has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation. (Footnote omitted). 52 L.Ed. 2d 571,578.

The teaching of *Evans* is as follows: In order to timely reach an alleged occurrence of discrimination under 42 U.S.C. § 2000e-5(e), an EEOC charge must be filed *within one hundred eighty days of a specific event of disadvantage* in the complainant's employment history (i.e., discharge, rejection for hire, rejection of promotion, etc.) *or within one hundred eighty days of the existence of a system of discrimination* (i.e., a nonvalidated testing requirement for hire or promotion, a rule requiring discharge of each garnished em-

ployee, etc.).

The application of this principle to the instant case is not a difficult one. The system of promotions which allegedly restricted the promotion of respondent ceased to exist on August 12, 1974. Thereafter, respondent's promotional advancement was controlled by a system which was not merely neutral on its face, but which gave respondent new and enhanced promotional opportunities. In *Teamsters v. U.S.*, 431 U.S. 324, 52 L.Ed. 2d 396 (1977), at footnote 30, the Supreme Court observed that "Evans holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been subject to a timely charge by the discriminatee." There is no question but what the charge at hand fails to mount a timely attack on petitioner's pre-August 12, 1974, seniority system regardless of the allegation of a "continuing violation." Neither does the charge reach any definable act, event or occurrence of promotional disadvantage incurred by respondent. Every act or occurrence shown to have taken place in regard to respondent within one hundred eighty days of her charge was an act of promotion. Respondent submitted no specific factual showing that she was rejected for or denied a promotion within the one hundred eighty days preceding her March 5, 1975, EEOC charge. Neither the complaint, nor any argument of respondent at any stage of this proceeding, nor the evidence submitted by petitioner (including respondent's deposition), nor the opinion of the Court below specifies any event or occurrence of rejection for promotion to which respondent was subjected within the relevant time period.

The decision of the Fifth Circuit Court of Appeals is in-



capable of a reading other than that it resolves "the increasingly litigated question, what constitutes a 'continuing violation' of the Act for purposes of 'tolling' the running of the one hundred eighty day period" by reliance on "recent support" for the "seriously disputed" doctrine "of expanding the continuing violation theory to continuing effects of past discrimination...." This "expansion" was made with total disregard to the Supreme Court's resolution of the identical issue in *Evans*.

The callous disregard of *Evans* in the decision below obviates the plain Congressional intent to preclude pursuit of stale claims under the Act. That the breadth of this obviation is alarming is starkly illustrated by the situation of the respondent in this case. Ms. Clark, under the operation of the August 12, 1974, promotion system of petitioner was promoted to press operator, the highest job to which she is entitled or. August 9, 1975. She reached the highest contractual step pay rate on October 19, 1977. Under the decision below's "expansion" of the "continuing violation" theory, were she to file a charge alleging a "continuing violation" on the date of the filing of this petition and a subsequent complaint predicated thereon, she would be held to have mounted a timely attack on petitioner's pre-August 12, 1974, promotion practices.[10] The Supreme Court addressed itself to this untenable proposition in *Evans* as follows:

> The statute does not foreclose attacks on the current operation of seniority systems which are

10. A timely attack on the old promotion system could also be mounted by any other female employee of petitioner or any other similarly situated employees until one hundred eighty days past such time as the new neutral or remedial promotion system resulted in their elevation to the top job and top pay scale in their plant.

> subject to challenge as discriminatory. But such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of §703 (h). 52 L.Ed. 2d 571, 579-580.

In the case at hand, respondent seeks not past seniority credit, which she has already received, but only past pay credit. Her own words on this issue are explicit. (App. "J", pp. A-152-A-154, p. A-156.) The gravamen of her claim is that if she had been promoted based on company seniority during the period from March 12, 1964, and August 12, 1974, she would on the date of her charge have been making more money and occupying a higher job classification. On March 5, 1975, these disadvantages were clearly mere *effects* of petitioner's prior promotion system and pre-August 12, 1974, denials of promotion which, having not been timely attacked by a charge, are of no legal consequence under *Evans*. On this basis, this petition should be granted and the decision below be overturned. Otherwise the plain words of the Act and the precise holding and policy of *Evans* are thwarted.

2. The decision of the Court of Appeals directly conflicts with the post-*Evans* decisions of the Second and Eighth Circuit Courts of Appeal and with post-*Evans* decisions of other panels of the Fifth Circuit.



In *De Graffenreid v. General Motors*, 558 F.2d 480 (8th Cir. 1977) the Eighth Circuit Court of Appeals was presented the first opportunity to apply the Supreme Court's *Evans* decision. The Court characterized the holding in *Evans* as follows:

> Evans establishes that post-Act discrimination affecting an employee's seniority status which is not made the subject of a timely charge with the EEOC must be treated the same as pre-Act discrimination, and thus an otherwise neutral seniority system cannot be attacked merely because it perpetuates the effect of such discrimination. 558 F.2d 480, 484.

Applying the holding of *Evans* to the facts of its case, the Court concluded as follows:

> In Evans, the discrimination was effectuated through forced resignation. Here, in contrast, the complaint focuses upon GM's alleged general pattern or practice of excluding black women from employment, which deterred these appellants from earlier seeking and obtaining employment with GM. Although we do not know precisely when GM's allegedly unlawful employment practices first affected these appellants, we can be sure that any unlawful failure to hire appellants ended on their respective dates of hire. As in Evans, the employer's seniority system is neutral in operation. Thus, when appellants failed to file charges with the EEOC within one hundred eighty days following their entry into service, GM was entitled to consider its earlier failure to hire appellants as lawful, a mere "unfortunate event in

> history which has no present legal consequenses [,]" *United Air Lines, Inc. v. Evans*, supra,__U.S. at ___, 45 LW at 4567, 14 FEP Cases at 1512, and measure appellants' seniority from their actual dates of hire. 558 F.2d 480, 485.

In *Cates v. Trans World Airlines*, 561 F. 2d 1064, (2nd Cir. 1977), the Second Circuit Court of Appeals held that present adverse effects resulting from earlier discrimination which was not made the subject of a timely charge were insulated from attack under *Evans*. The Court decided as follows:

> Under Evans, this does not charge a present violation of Title VII. Nor does the fact that present disadvantages arising from past discrimination crystallized in layoffs for Cates and George trigger a new period within which charges may be filed, as the district court believed. Cates and George stand in the same position as Whitehead, and, since the neutral seniority system here was insulated from attack by § 703(h), can only point to the initial refusal to hire as a violation of Title VII. Because such a claim was not asserted in timely fashion by any of the appellants, as held by the court below, see supra at 7, it has no present legal significance. We therefore affirm the dismissal of appellants' Title VII allegations. 561 F. 2d 1064, 1072.

In both of the above cases, the underlying charges were made by employees who were feeling the adverse "effect" of unemployment by virtue of alleged acts or systems of discrimination in layoffs which occurred more than one hundred eighty days prior to their charges. The acts and systems which their current disadvantages were predicated upon, as in the case at hand, no longer existed.



Similarly, here the plaintiff may have been subjected to earlier promotion discrimination under a discriminatory promotion system. The system no longer exists and the one which has replaced it is facially neutral and not itself under attack. To be sure, until she reached the top pay rate in the top job in her line of progression on October 19, 1977, respondent felt the effects of the prior discriminatory system in her pay check. But, the critical fact is that Ms. Clark had not been denied a promotion nor been subjected to a discriminatory promotion system within one hundred eighty days of her March 5, 1975 charge.[11] Accordingly, as in *Cates*, *De Graffenreid* and *Evans* itself the prior alleged discrimination against respondent may be treated by petitioner as a mere "unfortunate event in history which has no present legal consequences." 52 L.Ed. 2d 571, 578. The failure of the Fifth Circuit to so treat it places the decision *sub judice* in direct conflict with those of the Second and Eighth Circuits and is additional reason for grant of certiorari in this case.

Further, two subsequent decisions of different panels of the Fifth Circuit reach different results than that reached by the majority of the panel on the critical issues of the case at

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11. Contrary to the implications of *Rich v. Martin Marietta Corp.*, supra, to the extent relied upon by the majority in the case at hand in support of its "tolling" doctrine, the equities of expanding the statutory limitations period as defined in *Evans* would more rightfully flow to the victim of discharge or layoff -- characterized in the law of arbitration as "industrial capital punishment" -- than to an employee such as respondent here whose current deprivation is totally confined to small economic losses.

hand. In *McMonigle v. Delta Airlines, Inc.*, 556 F.2d 1261 (5th Cir. 1977) the Court held that a charge filed by a previously unlawfully discharged employee for employer's failure to rehire her was untimely when neither the act of discharge nor the rule requiring discharge was shown to have existed within one hundred eighty days of the charge. That panel found *Evans* controlling and approved the trial court's dismissal. And to create further uncertainty, yet a different panel of the Fifth Circuit Court of Appeals has decided that a failure to promote is not a "continuing violation" of 42 U.S.C. § 1981 so as to "toll" the running of the applicable statute of limitations under that statute. In *Cutliff v. Greyhound Lines, Inc.*, 558 F.2d 803, 805, f.n. 5 (5th Cir. 1977), the Court unequivocally stated as follows:

> We reject as baseless Shaw's contention that the claimed discrimination was a "continuing violation". The effect of the violation continued, but clearly the violation itself, if it occurred, was on or before the date of the award of the position to Daniel, August 15, 1972.

This total lack of uniformity in dealing with these crucial issues leaves the same uncertainty surrounding the one hundred eighty day question within the jurisdiction of this very Circuit as existed prior to the *Evans* decision.[12] This is a further compelling reason for grant of the writ of certiorari.

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12. To further confuse actual and potential Title VII litigants, on July 18, 1977, the EEOC responded to the *Evans* decision by announcing its interpretation of that decision relative to the "continuing violations" doctrine. An "interpretive" memorandum of that date provides as follows:



3. The case was appropriate for summary judgment as there is no genuine issue of material fact for trial.

Until appearance of the last paragraph of the majority opinion below, this case was treated by the parties and the courts as one in which no genuine factual issue was present and in which the question was whether judgment for petitioner was appropriate as a matter of law. In candor, the addition of this section of the opinion is only capable of fair characterization as an afterthought inserted by the majority to avoid the *Evans* doctrine which, as is apparent from the remainder of the opinion, and the dissent thereto, would otherwise mandate an opposite result. Although cognizant that this codicil to the opinion below adds a difficult dimension to this petition, petitioner respectfully submits that however adroit, this judicial manipulation is ill founded in law and is erroneous on the undisputed facts of this case.

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Footnote 12 (continued)

> The Commission interprets *United Airlines vs Evans* to hold only that discharges are not continuing violations. If a claim for unlawful discharge is not filed within 180 days of termination, the charge is not timely.
>
> The Commission does not consider that the case affects the continuing violation principle with respect to other employment practices. In particular, any allegation of discriminatory denial of transfer or promotion will be deemed continuing *if the practice or policy accounting for the denial remains in effect within 180 days of the charge.* The Commission will assume jurisdiction over such allegations. When evidence of continuing denial of advancement arises in the investigation of other issues, the matter of discriminatory denial of advancement will be addressed. (emphasis added) 95 LRR 234 (July 18, 1977)

Clearly the respondent's charge raises no timely attack on petitioner's pre-August 12, 1974 system under the above standards.

Such contrivance favors rather than diminishes the importance of the reasons for grant of this writ. Absent reversal of the decision below, the pre-*Evans* issues involving the one hundred eighty day issue have experienced a phoenix-like rebirth.

Summary judgment is a device for piercing the pleadings and allowing judgment without trial where there is no factual issue for trial and movant is entitled to judgment as a matter of law. The summary judgment procedure is often uniquely appropriate for deciding issues involving the statute of limitations.[13] The procedure is initiated by a movant's factual showing that there is no genuine issue of fact to be decided upon trial. If no special factual dispute is raised by the opponent's response thereto, the remaining issue is whether movant is entitled to judgment as a matter of law. In 1963, Rule 56, Federal Rules of Civil Procedure, was amended at section (e) to require that a party opposing summary judgment "not rest upon the mere allegations or denials of his pleadings, but ... set forth specific facts showing there is a genuine issue for trial." This addition to the rules specifically abrogated the right of a movant's opponent to rely on allegations contained in pleadings and memoranda to create the requisite issue of material fact for denial of the motion. Clearly, insofar as the holding of the Circuit Court below is predicated on its statement that "the allegations of the complaint...show that continuing discrimination is under attack", it is clearly erroneous as a matter of law. (App. "A", p. A-10, f.n.9.) "The...doctrine which permits the pleadings

13. Its use under other employment discrimination statutes for disposition of this issue is recognized. See *Gruca v. United States Steel Corp.*, 495 F.2d 1252 (3rd Cir. 1974); 6 Moore's Federal Practice §56.17(58) at 1059 (2nd ed 1975).



themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule." 6 Moore's Federal Practice, § 56.01[14] at 56-22 (2d ed. 1975). Cf. *Robin Construction Company v. U.S.*, 345 F.2d 610, 614 (3rd Cir. 1965).

The court below not only relied on the pleadings but also on certain "allegations" purportedly made by respondent in her deposition in finding a disputed issue of fact. This finding was made without regard that petitioner and respondent, both in brief and oral argument, acknowledged that the posture of the proceedings required the deposed testimony of respondent be accepted as true. The "critical disputed factual question" found by the court below was based on its finding that respondent "repeatedly stated that even after the effective date of the agreement, men with less company seniority than her seniority were promoted ahead of her." (App. "A", p. A-9.) It should be emphasized here that neither the Court below nor respondent at this critical stage of the proceeding relies on an argument or finding that petitioner's post-August 12, 1974, promotion system is other than neutral and nondiscriminatory. In any event, the new system is a matter of undisputed fact in this case and if it is an unlawful one, that determination is a matter of law, not fact. To defeat summary judgment in this context, then, respondent was obligated to show a genuine issue of fact in regard to an act or event of promotional adversity which befell her within one hundred eighty days of her charge. Respondent's obligation in this regard is to show specific facts contravening the otherwise undisputed fact that she had been promoted to every job for which she was eligible and qualified since the advent of the August 12, 1974, "AC" Agree-

ment.[14] A careful reading of respondent's deposition is necessary for a determination of whether an issue of genuine fact is actually raised thereby. But the difficulty or ambiguity attendant to this reading does not warrant rejection of summary judgment.[15]

The question raised by whatever confusion exists in respondent's deposition is one of law, not of fact. That question is whether the deposition shows respondent was, at any time within one hundred eighty days of her charge, rejected

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14. The Supreme Court has clearly held that to make an initial showing of discrimination under Title VII, a complainant must show "(i) that he belongs to a . . .minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As the Supreme Court stated at footnote 44 of its decision in *Teamsters v. U.S.*, supra, the purpose of the general criteria set out in *McDonnell Douglas* is to "demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." Absent such a showing, a Title VII defendant is entitled to summary judgment. There is no dispute as to what respondent said in her deposition; for summary judgment it must be taken as true. Thus, the issue actually resolved by the Court of Appeals was, as its own opinion clearly states, the legal issue of what quantum of facts constitutes a continuing violation of the Act for purposes of tolling the running of the one hundred eighty day period.

15. Where the ambiguity of a writing raises a difficult question, but one which must be resolved from the writing alone, the question raised is not one of fact but of law. *Ammons v. Franklin Life Insurance Company*, 348 F.2d 414 (5th Cir. 1965.)



for a promotion for which she was qualified and eligible.[16] If respondent's deposition established that she was rejected for an entitled promotion within one hundred eighty days of her charge, said charge was timely as a matter of law. If there is any dispute concerning a material fact in this case, it is a product only of slightly inconsistent statements made by respondent on deposition. Self-contradition by an opponent of summary judgment as a means of raising an issue of material fact is skeptically viewed by the courts, however, because it "would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Perma Research and Development Company v. Singer Company*, 410 F.2d 572, 578 (2nd Cir. 1969).

It is true that on deposition respondent had understandable difficulty recalling the dates of her promotions and these were ultimately established to be best substantiated by her company personnel records. (App. "J", p. A-108.) It is further true that she occasionally indicated that certain male employees were "put up before her." (App. "J", pp. A-83, A-84, A-109, A-111, A-150, A-154-155.) But petitioner does not deny the truth of these statements. In fairness to respondent, she was tenacious, not untruthful, on deposition. But, it was established by petitioner in respondent's deposition that on September 16 and 17 of 1974, two males less senior than respondent were promoted from press operator helper to press operator (App. "J", pp. A-141-143.) It is a matter of undisputed fact that on those dates, respondent occupied the job of roll tender and was eligible only for promotions to press operator helper under the facially neutral line of pro-

---

16. In operation of "line of progression" promotion systems such as utilized by petitioner, application is not a necessary pre-requisite to promotion as senior employees are entitled to automatic advancement to the next higher job upon a vacancy in that job.

gression promotion system. (App. "H", p. A-52). It was also repeatedly admitted by respondent on deposition that she was not only *not eligible* for promotion to press operator on September 16 or 17 of 1974, but that she was *not qualified* for this job at that time. (App. "J", pp. A-83-84, A-115-116, A-142-144, A-151, A-154-155.) Further, and more significantly, respondent repeatedly testified that the August 12, 1974, promotion system had resulted in no prejudice to her promotions but had only resulted in her advancement.[17]

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17. These portions of the deposition are as follows:

Q. Now, after you went on Roll Stand, but before you went to Helper, you said several times, that no man was promoted to Operator, I mean to Helper ahead of you, during that period of time, is that correct?

A. Not that I know of. (App. "J", p. A-112.)

Q. But since the time that you were trained and qualified, has any man been promoted ahead of you who had less Company seniority?

A. Right now, you talking about?

Q. I am talking about since you were qualified to run the Press. Since you had been trained in the Roll Tender and the Helper classification?

A. Has anybody went ahead of me?

Q. Yes, ma'am.

A. No. (App. "J", pp. A-115-116.)

Q. And since that incident, whenever it was, no man with less Company seniority than you has been promoted to any job ahead of you, is that correct?

A. That is right.

Q. And since, whenever your payrecords reflect that you were promoted to Roll Tender, you have been promoted ahead of everybody, male and female in that department, have you not?

A. That I have more Company seniority than, yes.

Q. You are charge - you do not charge in this lawsuit that the Company has violated that Agreement that is attached to your affidavit as Exhibit "2", do you?

A. What are you talking about?

Q. I am talking about the A C Agreement?

A. No, I did not say that, why?

Q. O.K. I was just asking you.



The burden carried by petitioner on summary judgment was to establish there was no material issue of fact requiring trial. The record shows the installation by petitioner of the August 12, 1974, promotion system which is at least neutral as to respondent. It shows she was thereunder promoted three times. It shows by her admission that she has not been denied a promotion to a job for which she was qualified. Respondent's burden was then to produce specific facts showing an issue for trial.[18] This she did not do. Summary judgment was then either appropriate or inappropriate as a matter of law under *Evans*, because there was only a legal issue left for resolution and the trial judge, in light of the intervening decision in *Evans*, decided it correctly. The Appellate Court did not, choosing at once to ignore and circumvent *Evans*. For that reason, grant of writ of certiorari is appropriate.

---

A. Yes.

Q. You are satisfied that the Company has abided by that Agreement as far as you are concerned, since it has been in affect, is that correct?

A. I suppose so. (App. "J", pp. A-116-117.)

Q. O.K., and you say that we continue to promote, or Olinkraft continues to promote to better paying jobs men who have less seniority than you or, you know, as a female. Now, has that happened to you since the first of September of 1974?

A. That somebody has been promoted around me, you mean?

Q. Yes ma'am.

A. No, they have not.

Q. To a job--since 1974, at least, you have been promoted by Company seniority and you have been promoted ahead of everybody, male and female, is that not correct?

A. Since the first job, yes. Since I got to the Roll Stand, I have been promoted like I should. (App. "J", pp. A-153-154.)

18. Allegations of confusion or inconsistency in the movant's testimony are not enough. *Lundeen v. Cordner*, 356 F.2d 169 (8th Cir. 1966.)

## CONCLUSION

Because the decision of the Fifth Circuit Court of Appeals contravenes an opinion of the U.S. Supreme Court and conflicts with its own opinion as well as those of other U.S. Circuit Courts of Appeal, and because of the national importance of the issues raised, it is respectfully urged that this writ of certiorari be granted.

Respectfully submitted,

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## CERTIFICATE

I hereby certify that a copy of the above and foregoing Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been this day forwarded to respondent's counsel of record, Joe D. Guerriero, by mailing him a copy, postage prepaid, to P.O. Box 4092, Monroe, Louisiana, 71201.

New Orleans, Louisiana, this 21st day of December, 1977.

_____

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-923

OLINKRAFT, INC.,

Petitioner

vs.

MARY EVELYN CLARK,

Respondent

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Mary Evelyn CLARK,
Plaintiff-Appellant

v.

OLINKRAFT, INC.,
Defendant-Appellee

No. 76 - 1183

United States Court of Appeals, Fifth Circuit

Aug. 4, 1977

Female employee brought suit against her employer pursuant to Title VII of the Civil Rights Act of 1964, alleging sex discrimination in promotions and pay. The United States District Court for the Western District of Louisiana, at Monroe, Tom Stagg, J., granted defendant's motion to dismiss, and plaintiff appealed. The Court of Appeals, Wisdom, Circuit Judge, held that where the complaint alleged not only that an agreement between union and employer, entered into more than 180 days before plaintiff filed her charge with the Equal Employment Opportunity Commission, did not sufficiently remedy the effects of past sex discrimination, but also that discrimination in promotion and pay constituted a continuing and unlawful employment practice in violation of Title VII, the allegations of the complaint brought her within

the accepted doctrine of "continuing violation" of the Civil Rights Act for purposes of "tolling" the running of the 180-day period; and even if the lower court dismissal order was viewed as a summary judgment, there existed a critical disputed factual question concerning acts of discrimination that continued beyond the effective date of the union agreement, precluding entry of summary judgment.

Reversed and remanded.

Coleman, Circuit Judge, filed a dissenting opinion.

Civil Rights – 40
Federal Civil Procedure – 2497

Where female's complaint alleged not only that agreement between her union and employer, entered into more than 180 days before she filed charge with Equal Employment Opportunity Commission, did not sufficiently remedy the effects of past sex discrimination, but also that discrimination in promotion and pay constituted a continuing employment practice in violation of Title VII, the complaint's allegations brought the case within the "continuing violation" doctrine for purposes of tolling the running of 180-day period; and even if lower court's dismissal order was viewed as a summary judgment, there existed a critical disputed fact question concerning discrimination that continued beyond union agreement's effective date, precluding summary judgment. Civil Rights Act of 1964, §§ 201 et seq., 701 et seq., 706(d), 42 U.S.C.A. §§2000a et seq., 2000e et seq., 2000e-5(e).

. . . . . .



Appeal from the United States District Court for the Western District of Louisiana.

Before TUTTLE, WISDOM, and COLEMAN, Circuit Judges.

WISDOM, Circuit Judge:

I.

Under Title VII of the Civil Rights Act of 1964 (the Act), a person seeking relief from employment discrimination is required to file a charge with the Equal Employment Opportunity Commission (EEOC) within one hundred and eighty days after the alleged unlawful practice has occurred.[1] This appeal raises the increasingly litigated question, what constitutes a "continuing violation" of the Act for purposes of "tolling" the running of the one hundred and eighty day period.

On March 5, 1975, Mary Evelyn Clark, plaintiff-appellant, filed a charge under oath with the EEOC in which she alleged that she suffered injury while employed at Olinkraft,Inc., the defendant-appellee, because she had been denied job promotions and pay on the basis of her sex. In a written decision dated July 23, 1975, the EEOC found no reasonable cause to believe that the defendant discriminated against the

1. The 1972 amendments to the Civil Rights Act of 1964 expanded many of the timing requirements established in the original Act. 42 U.S.C. § 2000e-5(d) was redesignated,42 U.S.C.§ 2000e-5(e), and the ninety day requirement was expanded to one hundred and eighty days. An examination of the legislative history of the amendments, as reported in 2 U.S.Code Cong. & Admin. News pp. 3224-3288 (1972), is unhelpful in addressing the problem involved in this case.

plaintiff in violation of the Act. On July 23, 1975, the Commission notified Clark under the provisions of Section 706(e) of Title VII of the Act, that she had the right to bring a civil action in a United States District Court. On October 7, 1975, Clark brought the present action against Olinkraft.

Clark alleged in her complaint that Olinkraft [2] employed her on March 12, 1964 as a feeder-grabber in its paper mill operations. On October 1, 1974, a period in excess of ten years from the date of her first employment with the defendant, the plaintiff was finally promoted from feeder-grabber to the position of roll handler. Clark contended that for some time before the Spring of 1964 and for some time thereafter, her employer had an established policy or practice of promoting to better paying jobs over qualified women, men with less seniority, and of paying women a lower salary than men performing the same job. Clark also alleged that during the period from March 12, 1964, to October 1, 1974, a period in excess of ten years, the defendant continued to promote from feeder-grabber to roll handler numerous men with less seniority than she and during this period men with less seniority were paid a higher salary than she for performing the same job. Additionally, the plaintiff alleges that the unlawful employment practices of the defendant have not ceased in that the defendant continues to promote to better paying jobs men with less seniority than she, who is qualified for these better paying jobs, and continues to pay men with less seniority a greater salary for performing the same job she performs.

Olinkraft moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted under 42 U.S.C.A.§2000-5(e),because "all allegations

2. Olinkraft, Inc., is engaged in the manufacture of folding cardboard cartons at the plant where Clark is employed.



of the complaint are based on facts and events which occurred more than one hundred eighty days prior to March 5, 1975, which was the date of the filing of her charge of employment discrimination with the United States Equal Employment Commission." The basis of Olinkraft's motion was that the United Paperworkers International Union, AFL-CIO, Local Union No. 654, collective bargaining representative for the employees, on August, 1974 entered into an agreement with Olinkraft whereby a certain "affected class" of female employees,[3] of which Clark is a member, would be allowed to compete for promotions based on their company seniority. Indeed, after the signing of the agreement, Clark was promoted several times. Olinkraft argues therefore that the alleged discriminatory system and practices ceased at the time the agreement went into effect,[4] more than one hundred eighty days before the plaintiff filed her charge. Presumably on this theory, the district court granted the motion to dismiss. From this order of dismissal Clark appeals.

II.

Initially, we note that the nature of the procedural context in which this case arises is somewhat unclear. The original motion by Olinkraft was styled as a motion to dismiss. In addition, the trial judge characterized his order as the granting of a motion to dismiss. The confusion[5] derives from the fact that Clark's deposition was also presented to the trial

3. The "affected class" was defined as "those female employees in the bargaining unit . . who were employed by Olinkraft prior to July 1, 1965.

4. The agreement is dated December 12, 1974, but specifically notes that the agreement is effective as of August 12, 1974.

5. During argument, counsel for the parties also were not certain as to the nature of the order issued below

judge. Although it is not apparent from the order, we assume that the deposition was considered, placing this case in a summary judgment framework. See 2A Moore's Federal Practice ¶12.09, at 2287-2313 (2d ed. 1975).

The allegations in the complaint bring the plaintiff's case within the accepted doctrine of continuing violations. *Rich v. Martin Marietta Corp.*, 10 Cir. 1975, 522 F.2d 333; *cf. Equal Employment Opportunity Commission v. Western Publishing Co.*, 8 Cir. 1974, 502 F.2d 599; *Macklin v. Spector Freight System, Inc.*, 1973, 156 U.S. App. D.C. 69, 478 F.2d 979; *Belt v. Johnson Motor Lines, Inc.*, 5 Cir. 1972, 458 F.2d 443; *Bartmess v. Drewrys U.S.A., Inc.*, 7 Cir. 1971, 444 F.2d 1186; *see generally* Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L.Rev. 1109, 1209-1212. Clark contends not simply that the agreement between the Union and Olinkraft does not sufficiently remedy the effects of past discrimination but also that discrimination in promotion and pay constitutes a continuing and unlawful employment practice in violation of Title VII.

In the trial court, Olinkraft argued that the *failure to promote* does not constitute a continuing violation, relying heavily on cases holding that the *failure to hire* does not constitute a continuing violation. *Collins v. United Airlines*, 9 Cir. 1975, 514 F.2d 594; *East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332. As pointed out by the court, however, in *Rich v. Martin Marietta Corp.*, 10 Cir. 1975, 522 F.2d 333, 348, cases involving the failure to promote are distinguishable. The court in *Rich* commented as follows:

> We finally must take up the factor of timing. The court found that in some instances there were no openings in



> positions for which the plaintiffs were qualified within the 90 days [now 180 days] prior to the filing of charges with the EEOC. The court apparently read *McDonnell-Douglas* [*McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668] as saying that if an employer has employed no one during the 90 days [now 180 days] preceding the filing of charges with the EEOC, it is impossible to have an unlawful employment practice committed within the time limitations of 42 U.S.C. § 2000e-5(e).
>
> This is in relation to the *McDonnell-Douglas* criterion requiring that plaintiff show that he applied for a job for which the employer was seeking applicants. *Clearly this applies to new employment and is different from an employee who is seeking promotion. The former takes place on a particular day, whereas in the promotion area it invariably arises during a lengthy period of time. Plaintiffs here challenge the entire promotion system maintaining that it continually operated so as to hold them in lower echelons. Hence, the 90 days period [now 180 days] period prior to the filing of the EEOC charges looms inconsequential in this kind of case.* If proven, these charges of discriminatory refusal to promote would be violative of 42 U.S.C. § 2000e-5. (Emphasis added.)

We are in accord with the views expressed in *Rich*. Clark's allegations, therefore, are sufficient to toll the running of the one hundred and eighty day period; here the discrimination in promotion and pay continues.

The same result obtains when the case is viewed as a summary judgment. Olinkraft contended during argument that

viewed as a summary judgment, the plaintiff's only possible claim is that continuing effects of past discrimination make her filing timely and that even if this theory might be valid in some circumstances, the theory has no application in the present setting since Olinkraft's agreement with the Union provides full relief.

For several reasons, Olinkraft's argument fails. To begin with, the posture of the case does not permit us to say whether or not the Union agreement affords full relief. This is a determination to be made initially by the district court, *Franks v. Bowman Transportation Co.*, 1976, 424 U.S. 747, 770-71, 96 S.Ct. 1251, 47 L.Ed. 2d 444, and no such determination has yet been made. Second, although the validity of expanding the continuing violation theory to continuing effects of past discrimination is seriously disputed, there is some recent support for this expansion. See *Evans v. United Airlines*, 7 Cir. 1976, 534 F.2d 1247, *cert. granted*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282 (1976);[6] *Keenan v. Pan-American World Airways* (N.D. Cal. 1976), 13 FEP 1530. In *Evans*, the Court was faced with a charge filed in February of 1973 by a plaintiff who had been terminated in 1968 because of an unlawful "no-marriage" rule. The company established this rule in 1968 and in 1972 hired plaintiff as a new employee. The plaintiff complained that she should receive seniority credit based on her prior service. The company defended on the basis that the seniority system was neutral and plaintiff's charge was untimely as to any alleged unlawful act. The *en banc* court reconsidered its original affirmance of the dismissal of this case in light of the Supreme Court's decision in *Franks v. Bowman Transportation Co.* In *Franks* the Supreme Court addressed itself to the appropriateness of remedial competitive seniority as remedial

6. The petition for certiorari was filed on September 3, 1976, and was granted November 1, 1976. Oral argument was heard on March 29, 1977.



relief for discriminatees who had been denied employment or transfers based on past unlawful discrimination. The Court decided that such retroactive seniority was a proper remedy. It concluded that "[a]dequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had "he been hired at the time of this application" 424 U.S. at 764-65, 96 S.Ct. at 1265. In light of *Franks*, the Seventh Circuit reversed its original decision. The seniority system, it held, which denied that plaintiff credit for seniority prior to her unlawful discharge, "transmits into the present the disadvantages allegedly resulting from 1968 discrimination". The action was therefore held not to be time-barred.

We need not reach the question presented in *Evans*, however, since even if the trial court order is viewed as a summary judgment, there exists a critical disputed factual question concerning the active discrimination that continued beyond the effective date of the agreement.[7] Although Clark's deposition was confusing at points, she repeatedly stated that even after the effective date of the agreement, men with less company seniority than her seniority were promoted ahead of her. As a result, summary judgment was inappropriate.[8]

7. While this opinion was being circulated, the Supreme Court reached a decision in *Evans*, — U.S.— , 97 S.Ct. 1885, 52 L.Ed.2d—(1977), reversing the Court of Appeals. As already noted, our decision in the instant case does not depend on the validity of the theory asserted in *Evans*.

8. We also note that appellant contends that even if her only claim related to continuing effects of past discrimination, the date on which she was first promoted, September 8, 1974 according to appellee and October 1, 1974 according to appellant, rather than the effective date of the Olinkraft-Union agreement should control. If the date of promotion controls, whether it is September 8 or October 1, appellant's action is not time-barred. In light of our disposition, we need not reach this question.

The allegations of the complaint and testimony in the deposition show that continuing discrimination is under attack. The appellant's action therefore is not time-barred.[9]

REVERSED AND REMANDED.

COLEMAN, Circuit Judge, dissenting.

*United Air Lines v. Evans*, — U.S. — , 97 S.Ct. 1885, 52 L.Ed.2d — , was a case in which an airline stewardess claimed that she was a victim of "continuing discrimination". The Supreme Court held that an employer may treat as lawful any allegedly discriminatory act committed more than 180 days prior to the filing of the charge, although such conduct may be relevant background evidence in a proceeding in which the status of a current practice is at issue. The Court went on to say that if one is claiming continued discrimination then "the critical question is whether any present *violation* exists" [emphasis in the original text].

On that basis the judgment of the District Court in this case should be affirmed.

The critical issue is whether Mary Evelyn Clark was the victim of unlawful employer discrimination at the time she filed her complaint or within 180 days prior thereto. The EEOC held that there was no reason to believe that she was so discriminated against. The District Court agreed, and I would likewise agree.

---

9. Our disagreement with the views expressed in the dissent is based on the fact that the allegations in the complaint and the deposition created an issue of fact relating to present discrimination. Summary judgment is an inappropriate vehicle for deciding factual questions, and it is on this basis that we reverse.



From and after August 12, 1974, the plaintiff's promotions and wages were governed by a settlement agreement entered into by the employer, the union, and the EEOC. The District Court had before it a deposition given by Mrs. Clark in which she admitted that the company had lived up to the 1974 agreement. She had been promoted to roll handler on September 8, 1974, to press operator helper on October 7, 1974, and to press operator on August 9, 1975. Her statements about men receiving promotions to which she had been entitled prior to September 5, 1974, were highly tenuous and reflected nothing more than her personal opinion that she should have received earlier promotions and been making more money. This despite the fact that she had been formally reprimanded for excessive absenteeism in 1971, 1972, 1973, and 1974. She had been granted extensive leaves of absence in 1969, 1970, and 1975.

It is obvious that Mrs. Clark filed her EEOC complaint more than 180 days after the effective date of the agreement entered into between the company, her union, and EEOC. That should dispose of the case.

But in addition to that, it seems crystal clear on this record that when she did file her complaint there was no presently existing violation. If none then existed, then none could have been continuing and that is all there is to the case.

We have a duty to enforce the mandates of the Constitution and of Congressional enactments against unlawful discrimination in employment. It is equally our duty, I think, not to detect discrimination when none is shown to have existed.. Therefore, most respectfully, I would not require the District Court to spend any more time on this claim.

I must dissent.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76 - 1183

D.C. Docket No. CA 751088

MARY EVELYN CLARK,

Plaintiff-Appellant,

versus

OLINKRAFT, INC.,

Defendant-Appellee

Appeal from the United States District Court for the Western District of Louisiana

Before TUTTLE, WISDOM and COLEMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, re-



versed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 4, 1977

COLEMAN, Circuit Judges, dissenting.

Issued as Mandate:

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

November 7, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76 - 1183 - MARY EVELYN CLARK v.
OLINKRAFT, INC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
By: s/ Brende M. Hauck
Deputy Clerk



** on behalf of appellee, Olinkraft, Inc.,

cc: Messrs. Joe D. Guerriero
Allan L. Placke
Mr. Peyton Lacy, Jr.
Mr. G. Phillip Shuler

APPENDIX D

ORDER STAYING MANDATE

United States Court of Appeals
Fifth Circuit

Office of the Clerk
Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans,La. 70130

November 22, 1977

Mr. G. Phillip Shuler
Attorney
1500 FNBC Bldg.
New Orleans, La. 70112

No. 76-1183 - Mary Evelyn Clark v. Olinkraft, Inc.

MANDATE STAYED TO AND INCLUDING
December 22, 1977

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.



Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH,Clerk

By s/ Susan N. Gravois
Deputy Clerk

enc.

cc: Messrs. Joe D. Guerriero
Allan L. Placke
Mr. Peyton Lacy, Jr.

## APPENDIX E

## JUDGMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Filed: December 31, 1975

MARY EVELYN CLARK,
Plaintiff

versus

OLINKRAFT, INC.
Defendant

JUDGMENT

This action came for hearing on Defendant's Motion to Dismiss before the Court, Honorable Tom Stagg, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged

That Defendant Olinkraft, Inc.'s Motion to Dismiss be, and it hereby is, granted and that this action be, and it hereby is, dismissed, with prejudice, and that the costs thereof be assessed against Plaintiff.

Dated at Shreveport, Louisiana, this 15th day of December 1975.

s/ Tom Stagg
United States District Court Judge



## APPENDIX F-1

Rule 706(e) of the Equal Employment Opportunity Act

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

## APPENDIX F-2

### Rule 12.
### DEFENSES AND OBJECTIONS - WHEN AND HOW PRESENTED - BY PLEADING OR MOTION - MOTION FOR JUDGMENT ON THE PLEADINGS

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.



## APPENDIX F-3

### Rule 56
### SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at

the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential



to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; January 21, 1963, eff. July 1, 1963.

# APPENDIX G- Complaint

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
12:15 pm
OCT - 6 1975
ROBERT H. SHEMWELL, CLERK
By [illegible]
Deputy
Crenshaw

MARY EVELYN CLARK

VERSUS

OLINKRAFT, INC.

CIVIL ACTION NO._____

Q 751038

COMPLAINT

NOW INTO COURT, through her undersigned counsel, comes Mary Evelyn Clark, for purposes of filing this complaint, respectfully represents:

1.

Jurisdiction of this Court is invoked pursuant to 28 USC, Sections 1331, 1343, and 2201. This is a suit in equity authorized and instituted pursuant to Title VII of the Act known as "The Civil Rights Act of 1964," 42 USC, Section 2000 E et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by Title VII of the Act known as "The Civil Rights Act of 1964," 42 USC, Section 2000 E et seq., providing for injunctive and other relief against sex discrimination in employment. The suit also is authorized under Title 42, USC, Sections 1981 and 1983 and the United States Constitution—more particularly the Fifth and Fourteenth Amendments thereto.

2.

Plaintiff, a female, is a citizen of the United States residing in the State of Louisiana.

3.

Defendant Olinkraft, Inc., with offices in the City of West Monroe, State of Louisiana, is a corporation engaged in industry affecting commerce and during all times material to this action has employed more than 100 employees for each working day in each of 20 or more calendar weeks in each year material to this action.



4.

In the Spring of 1964 and for some time prior thereto and for some period of time thereafter, defendant had a policy or practice of promoting to better paying jobs over qualified females, males with less seniority, and of paying females a lesser salary than males performing the same job, and which practice or policy is a violation of the Civil Rights Act of 1964.

5.

Plaintiff, a female, was employed by defendant on March 12, 1964, as a feeder-grabber in its paper mill operations. Plaintiff, after 10 years and 7 months was finally promoted to roll handler on October 1, 1974. During this 10 year and 7 month period, numerous males with less seniority than plaintiff, a qualified female, were promoted from feeder-grabber to roll handler. Additionally, males with less seniority than plaintiff, performing the same job as plaintiff were paid a higher salary than plaintiff. Defendant continues to promote to better paying jobs males with less seniority than plaintiff, a female qualified for such better paying jobs. Defendant further continues to pay males with less seniority than plaintiff a greater salary for performing the same job as plaintiff. All of the acts of the defendant hereinabove described are a violation of the Civil Rights Act of 1964.

6.

Plaintiff filed a written charge under oath with the Equal Employment Opportunity Commission in which she claimed to be aggrieved by defendant because she was denied job promotions and pay on the basis of her sex.

7.

In a written decision dated July 23, 1975, a copy of which is attached to the Complaint already on file herein as Exhibit A and incorporated herein, the Equal Employment Opportunity Commission did not find reasonable cause to believe that plaintiff had been discriminated against by defendant in violation of the Civil Rights Act of 1964. On July 23, 1975, the Commission notified plaintiff under the provisions of Section 706 (a) of Title VII of the Civil Rights Act of 1964, that plaintiff had the right to bring a civil action in a United States District Court.

BEST COPY AVAILABLE

8.

Plaintiff is entitled to damages to the extent provided by law as a result of the hereinabove described discriminatory practices and policies of the defendant.

WHEREFORE, plaintiff demands judgement against defendant as follows:

(1) Enjoining it from continuing its discriminatory practice or policy of promoting to better paying jobs males with less seniority than qualified females and paying males with less seniority than females a greater salary for performing the same job.

(2) For damages in the form of a money judgement as a result of the hereinabove described discriminatory practices.

(3) Attorneys' fees costs and such other relief as the Court believes proper.

Joe D. Guerriero

JOE D. GUERRIERO
P.O. BOX 4092
MONROE, LOUISIANA 71201
ATTORNEY FOR PLAINTIFF

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
This is to certify that the above and foregoing contained on this and preceding 2 pages is a true and correct copy of the original.
October 10 1975
ROBERT H. [illegible], CLERK
By [illegible]
Deputy Clerk



NEW ORLEANS DISTRICT OFFICE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

333 ST. CHARLES STREET

NEW ORLEANS, LOUISIANA 70130

Area Code 504
589-2725

CERTIFIED MAIL NO. 66[illegible]774 CHARGE NO. 06[illegible]

MARY EVELYN CLARK
RT. 1 BOX 214 1/2
CALHOUN, LOUISIANA 71[illegible] CHARGING PARTY

AND

OLINKRAFT, INC.
P. O. BOX 488
WEST MONROE, LOUISIANA 71291 RESPONDENT

DETERMINATION

UNDER THE AUTHORITY VESTED IN ME BY SECTION 1601.19b OF THE COMMISSION'S PROCEDURAL RULES, 37 FED. REG. 20165 (SEPTEMBER 27, 1972), I ISSUE, ON BEHALF OF THE COMMISSION, THE FOLLOWING DETERMINATION AS TO THE MERITS OF THE SUBJECT CHARGE.

THE TIMELINESS, DEFERRAL, AND ALL OTHER JURISDICTIONAL REQUIREMENTS HAVE BEEN MET; THE RESPONDENT IS AN EMPLOYER WITHIN THE MEANING OF TITLE VII.

THE CHARGING PARTY ALLEGES THAT THE RESPONDENT VIOLATED TITLE VII BY REFUSING TO PROMOTE HER BECAUSE OF THE CHARGING PARTY'S SEX, FEMALE.

THE EVIDENCE DOES NOT SUPPORT THE CHARGE.

EVIDENCE OBTAINED BY THE COMMISSION SHOWS THAT THE CHARGING PARTY WAS DENIED A PROMOTION FOR REASONS WHICH WERE NOT, IN AND OF THEMSELVES, ILLEGALLY DISCRIMINATORY. FURTHER, THE EVIDENCE SHOWS THAT OTHER PERSONS, REGARDLESS OF ETHNIC GROUP OR SEX, WERE TREATED IN THE SAME GENERAL MANNER AS WAS THE CHARGING PARTY. NO EVIDENCE WAS DISCOVERED WHICH SHOWS THAT PERSONS OF OTHER RACES, ETHNIC GROUPS, OR SEX WERE TREATED DIFFERENTLY FROM THE CHARGING PARTY, IN SIMILAR CIRCUMSTANCES.

THE COMMISSION HAS MANY TIMES HELD THAT IN SITUATIONS SUCH AS THIS, WHERE PERSONS ARE EQUALLY TREATED IN THE PROMOTION PROCESS, THERE IS NO VIOLATION OF TITLE VII. THE CHARGING PARTY'S MERE ASSERTION THAT THERE WAS DISCRIMINATION UNDER TITLE VII IS NOT SUFFICIENT FOR A FINDING OF ILLEGAL EMPLOYMENT PRACTICES. SEE, FOR EXAMPLE, COMMISSION DECISIONS NO. 70-532, 70-821, 70-496, AND 70-738, CCH EEOC DECISIONS (1973), PARA. 6088, 6088, 6111, AND 6153.

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Having examined the entire record, I conclude that there is not reasonable cause to believe that Title VII of the Civil Rights Act of 1964, as amended, has been violated in the manner alleged.

This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, the Charging Party may do so by filing a private action in Federal District Court within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed "Notice of Right to Sue".

On behalf of the Commission:

GLENN P. CLASEN
DISTRICT DIRECTOR

P. 2

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NEW ORLEANS DISTRICT OFFICE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

333 ST. CHARLES STREET

NEW ORLEANS, LOUISIANA 70130

Area Code 504
589-2725

IN REPLY REFER TO:

TO: MARY EVELYN CLARK

MARY EVELYN CLARK
VS.
OLINKRAFT, INC.
CHARGE NO. 868-81647-9

NOTICE OF RIGHT TO SUE

WITHIN 90 DAYS

IN CASE NO. 868-81647-9 BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, UNITED STATES GOVERNMENT.

YOU ARE HEREBY NOTIFIED THAT:

WHEREAS, THIS COMMISSION HAS NOT FILED A CIVIL ACTION WITH RESPECT TO YOUR CHARGE AS PROVIDED BY SECTION 706(F) (1) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. 2000E ET SEQ. (1964), AND AS AMENDED BY THE EQUAL EMPLOYMENT ACT OF 1972 (PUBLIC LAW 92-261) (1972); AND

WHEREAS, THIS COMMISSION HAS NOT ENTERED INTO A CONCILIATION AGREEMENT TO WHICH YOU ARE A PARTY;

THEREFORE, PURSUANT TO SECTION 706 (F) OF TITLE VII, YOU MAY INSTITUTE A CIVIL ACTION IN THE UNITED STATES DISTRICT COURT HAVING JURISDICTION OVER YOUR CASE WITHIN 90 DAYS OF RECEIPT OF THIS NOTICE.

SHOULD YOU DECIDE TO COMMENCE JUDICIAL ACTION, YOU MUST DO SO WITHIN 90 DAYS OF THE RECEIPT OF THIS LETTER OR YOU WILL LOSE YOUR RIGHT TO SUE UNDER TITLE VII.

IF YOU ARE NOT REPRESENTED BY COUNSEL AND YOU ARE UNABLE TO OBTAIN COUNSEL THE COURT MAY, IN ITS DISCRETION, APPOINT AN ATTORNEY TO REPRESENT YOU. IF YOU DECIDE TO INSTITUTE SUIT AND FIND YOU NEED SUCH ASSISTANCE, YOU MAY TAKE THIS NOTICE, TOGETHER WITH THE COMMISSION'S DETERMINATION ACCOMPANYING THIS NOTICE, TO THE CLERK OF THE FEDERAL DISTRICT COURT NEAREST TO THE PLACE WHERE THE ALLEGED DISCRIMINATION OCCURRED, AND REQUEST THAT A FEDERAL DISTRICT JUDGE APPOINT COUNSEL TO REPRESENT YOU.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

* * * * * * * * * * * * * * * * * * * *

KARY EVELYN CLARK

VERSUS

OLDCRAFT, INC.

* * * * * * * * * * * * * * * * * * * *

Civil Action No. 751088

MOTION TO DISMISS

NOW COMES Oldcraft, Inc., Defendant in the above case, and under Rule 12(b) of the Federal Rules of Civil Procedure, moves to dismiss the allegations of the Complaint on the following grounds:

1. The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. §1981 and the Court has no jurisdiction over the subject matter of the suit under 42 U.S.C. §1981 because the Complaint alleges discrimination based on Plaintiff's sex and there is no cause of action based on sex under 42 U.S.C. §1981.

2. The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. §1983 and the Court has no jurisdiction over the subject matter of the suit under 42 U.S.C. §1983 because it is not alleged in the Complaint that the alleged discrimination occurred under color of state law or that the alleged discrimination resulted from state action and absent such allegations, there can be no cause of action based on 42 U.S.C. §1983.

3. The Complaint fails to state a claim upon which relief may be granted under the Fifth and Fourteenth Amendments to the United States Constitution and the Court has no jurisdiction over the subject matter under said Fifth and Fourteenth Amendments because it is not alleged in the Complaint that the alleged discrimination occurred under color of state law or that the alleged discrimination resulted from state action.

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PAGE 2.

YOU SHOULD BE AWARE, HOWEVER, THAT IF YOU FAIL TO INSTITUTE SUIT WITHIN THIS 90-DAY PERIOD YOU LOSE YOUR RIGHT TO SEEK

JUDICIAL RELIEF AGAINST THE RESPONDENT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED.

PLEASE FEEL FREE TO CONTACT THE COMMISSION IF YOU HAVE FURTHER QUESTIONS ON THIS MATTER.

SHOULD YOU DECIDE TO SUE PLEASE HAVE YOUR ATTORNEY COMPLETE THE ENCLOSED POSTCARDS AS SOON AS POSSIBLE.

SINCERELY YOURS,

GLENN P. CLASEN
DISTRICT DIRECTOR

7-23-75

4. The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. §2000e - 5(e) because all allegations of the Complaint are based on facts and events which occurred more than one hundred eighty days prior to March 5, 1975, which was the date of the filing of her charge of employment discrimination with the United States Equal Employment Opportunity Commission. (A copy of that charge is attached and appended as Exhibit A hereto.)

WHEREFORE, Defendant Olinkraft prays that the Complaint be dismissed in its entirety and that the allegations of the Complaint as they purport to allege a violation of the Fifth and Fourteenth Amendments to the United States Constitution and of 42 U.S.C. §1981 and 42 U.S.C. §1983, and as they purport to allege a violation of 42 U.S.C. §2000e, et. seq., be dismissed for the above-stated reasons.

WHERE IT IS FURTHER PRAYED that Defendant Olinkraft, Inc., be awarded reasonable attorneys' fees as provided for by 42 U.S.C. §2000e - 5 (k) and that they be afforded all other necessary and proper relief.

Respectfully submitted this 7th day of November, 1975.

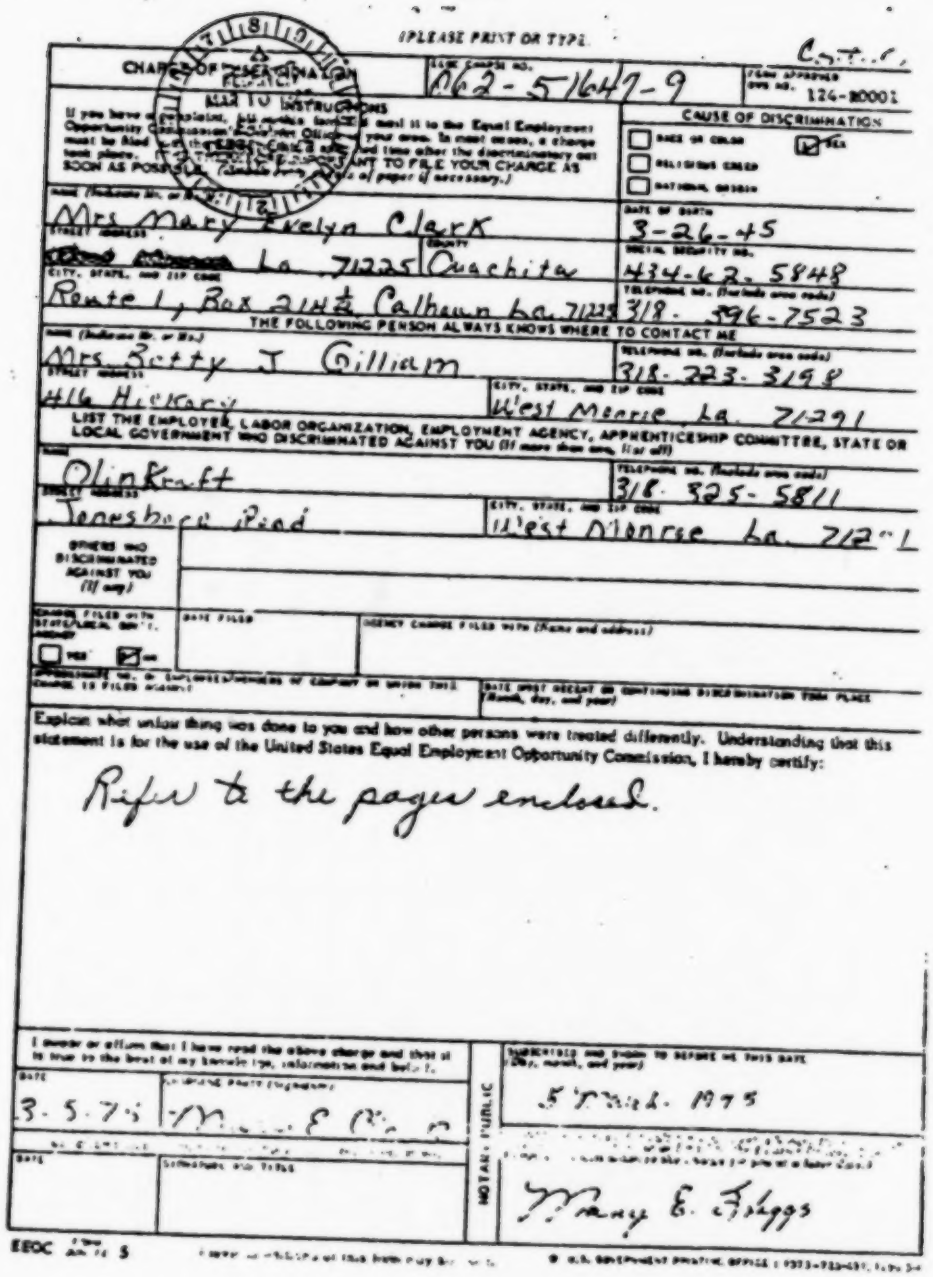
Peyton Lacy, Jr.
Labor Counsel
Olinkraft, Inc.
P. O. Box 488
West Monroe, Louisiana 71291
318/325-5811, extension 131

G. Phillip Shuler
Chaffe, McCall, Phillips, Toler & Sarpy
1500 First National Bank of Commerce Building
New Orleans, Louisiana 70112

COUNSEL FOR DEFENDANT OLINKRAFT, INC.

November 7, 1975





(PLEASE PRINT OR TYPE)

C.P.C.

CHARGE OF DISCRIMINATION — FEPA — EEOC

462-51647-9

FORM APPROVED OMB NO. 124-R0001

READ INSTRUCTIONS BEFORE COMPLETING THIS FORM

If you have a complaint, you may contact this office and it is the Equal Employment Opportunity Commission's responsibility to contact you in your area. In most areas, a charge must be filed with the EEOC within 180 days of the alleged discrimination, or in some cases other time limitations may apply. THE LAW REQUIRES THAT YOU SIGN THIS CHARGE AND THAT WE HAVE YOUR SIGNATURE IN ORDER TO PROCESS IT. YOU ARE ALSO REQUIRED TO FILE YOUR CHARGE AS SOON AS POSSIBLE. (Number all pages and attach additional pages if necessary.)

CAUSE OF DISCRIMINATION
☐ RACE OR COLOR ☐ RELIGIOUS CREED ☐ NATIONAL ORIGIN ☑ SEX

Mrs. Mary Evelyn Clark — DATE OF BIRTH 3-26-45
Ouachita La. 71225 — SOCIAL SECURITY NO. 434-62-5848
Route 1, Box 214A Calhoun La. 71225 — TELEPHONE NO. (Include area code) 318-396-7523

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

Mrs. Betty J Gilliam — TELEPHONE NO. (Include area code) 318-323-3198
#16 Hickory — CITY, STATE, AND ZIP CODE West Monroe La. 71291

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU (If more than one, list all)

NAME: Olinkraft — TELEPHONE NO. (Include area code) 318-325-5811
STREET ADDRESS: Jenesboro Road — CITY, STATE, AND ZIP CODE West Monroe La. 71291

NAMES WHO DISCRIMINATED AGAINST YOU (If any)

CHARGE FILED WITH STATE OR LOCAL AGENCY? ☐ YES ☑ NO — DATE FILED — AGENCY CHARGE FILED WITH (Name and address)

EMPLOYMENT NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THAT DISCRIMINATED AGAINST ME — DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year)

Explain what unlaw thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

Refer to the pages enclosed.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE 3-5-75 — SIGNATURE OF COMPLAINANT (Signature)

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year) 5 March 1975

DATE — SIGNATURE AND TITLE

NOTARY PUBLIC

Mary E. Briggs

EEOC Form 5

EXHIBIT A

RECEIVED
MAR 10 1975
EEOC
District Office
N. O., La.

Mary E. Clark
Rt. 1, Box 211½
Louisiana, 71325

Dear Sirs:

I have been working at Olinkraft for Eleven years and. I have been classified as Feeder Grabber for ten of it. Until recently I have never been allowed in the line of progression. I have been classified a Feeder Grabber on the same level as a Male Grabber.

I was asked once before to go in the Male Grabbing job, but I refused because I was already in that line. doing the same thing.

When the A.C Agreement went into effect about 5 months ago. I was asked once again to go in the Male Grabbing job and I refused again, and I asked to go to the Roll Stand which is the next job for the men, but I was refused. I went to the Union and they

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machine of her own. I
was worked no hygiene, and
was expected to operate
training. The youngest
with only 3 months
put on 8 train me. I
me the proper training
his job, and he would
assistant Pharmacy.
I feel I have been
of money as I testified
finally put up to Pres
should be raised
time I was not allow

Yours truly
Mary E. Clark



APPENDIX H - Olinkraft, Inc.'s Motion to Dismiss and Memorandum in Support Thereof, with Attachments

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

MARY EVELYN CLARK

VERSUS

OLINKRAFT, INC.

Civil Action No. 751088

MEMORANDUM IN SUPPORT OF
DEFENDANT OLINKRAFT'S MOTION TO DISMISS

I. There is No Cause of Action for Sex Discrimination Under 42 U.S.C. §1981

Plaintiff, a woman, seeks to bring this action for alleged violation of the provisions of 42 U.S.C. §1981. She alleges that she was discriminated against in terms of promotions and wages because of her sex and that males of lesser seniority received promotions and wages which were denied to her because of her sex.

The Civil Rights Act of 1866, 42 U.S.C. §1981, reads as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

It is now virtually unquestioned that this legislation prohibits discrimination, including certain employment discrimination, based on race and gives rise to a separate and distinct cause of action for race discrimination. Johnson v. Railway Express Agency, Inc., 10 FEP 817 (1975). But, it is undisputed that the above statute does not give rise to a cause of action for sex discrimination. Where "(t)he basis of the complaint...is defendant's alleged discrimination on the basis of sex," it is uniformly held that "(t)he absence of any indication of racial discrimination is fatal to a cause of action under §1981." Harris v.

National Tea Co., 4 FEP 3 (N.D. Ill. 1971). There are countless decisions in support of this principle in the various United States District Courts. See, Strunk v. Western Kentucky University, 11 FEP 355 (E.D. Ky. 1975); Rackin v. University of Pennsylvania, 386 F.Supp. 992, 10 FEP 1318 (E.D. Pa. 1974); Barfield v. A.R.C. Security, Inc., 10 FEP 789 (N.D. Ga. 1975); Stuart v. Hewlett-Packard Co., 10 FEP 66 (E.D. Mich. 1974); Waters v. Heublin, 8 FEP 908 (N.D. Cal. 1974); Olson v. Rembrandt Printing Co., 375 F.Supp. 413, 7 FEP 991 (E.D. Mo. 1974); Held v. Missouri Pacific Railroad Co., 373 F.Supp. 997, 7 FEP 789 (S.D. Tex. 1974); Abshire v. Chicago & Eastern Illinois Railroad Co., 352 F.Supp. 601, 5 FEP 296 (N.D. Ill. 1972); Marshall v. Plumbers Local 60, 343 F.Supp. 70, 4 FEP 1224 (E.D. La. 1972); Williams v. San Francisco Unified School District, 340 F.Supp. 438, 4 FEP 495 (N.D. Cal. 1972); Fitzgerald v. United Methodist Community Center, 335 F.Supp. 965, 4 FEP 167 (D.C. Neb. 1972). Further, while specifically stating that a companion statute contained in the Civil Rights Act of 1866, 42 U.S.C. §1982, did not give rise to a cause of action based on sex, national origin or religious discrimination, the Supreme Court has pointed out that all portions of this statute, including 42 U.S.C. §1981, applied only to racial discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 19 L.Ed. 2d 1189, 88 S.Ct. 2186 (1968). The rationale of this line of authority is that the plain language of 42 U.S.C. §1981 and its legislative history clearly indicates that its only purpose was to prevent racial discrimination. It was written to convey to citizens of all races the same rights and privileges as those "enjoyed by white citizens...." Thus, its protection clearly does not extend to those claiming employment disadvantages based upon their sex.

Based upon the clear mandate of authority cited above, a sex discrimination suit alleging as its basis 42 U.S.C. §1981 does not state a claim upon which relief can be granted or which is within the subject matter jurisdiction of this Court. Under these circumstances, a motion to dismiss these allegations is appropriate and should be granted. See, e.g., Barfield v. A.R.C. Security, Inc., supra.

II. There is No Cause of Action Against Private Employers Under 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the United States Constitution

Defendant Clinkraft is a Delaware corporation with its principal offices and facilities located in West Monroe, Louisiana, where it is engaged in the production,



manufacture and sale of wood and paper and related products. Plaintiff seeks to maintain this action under 42 U.S.C. §1983. That statute reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

She also seeks to state a cause of action under the United States Constitution and alleges the suit is authorized under the Fifth and Fourteenth Amendments thereto. The pertinent portions of those Amendments are set out below:

> "Fifth Amendment
>
> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.
>
> * * * * *
>
> "Fourteenth Amendment
>
> "Section 1. [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Although the current status of the law is unclear on the issue of whether or not sex discrimination is prohibited by 42 U.S.C. §1983,[1] it is well-settled that "(a)bsent a claim of 'state action' or 'deprivation under color of law' an action under (42 U.S.C. §1983 and 28 U.S.C. §1343) cannot lie...." Smith v. United Press International, 8 FEP 886 (S.D. N.Y. 1974). The decisions on this issue clearly establish that absent such allegations, a claim under 42 U.S.C. §1983 must be dismissed. Bottoms v. St. Vincent's Hospital, 11 FEP 392 (S.D. Ind. 1975); Wilson v. Sharon Steel Corp., 11 FEP 145 (W.D. Pa. 1975); Cohen v. Illinois Institute of Technology, 384 F.Supp. 202, 11 FEP 368 (N.D. Ill. 1974); Thomas v. Ford Motor Co., 396 F.Supp. 52, " FEP 121, 126 (E.D. Mich. 1973).

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[1] Compare Knott v. Missouri Pacific R.R. Co., 389 F.Supp. 856, 10 FEP 339 (E.D. Mo. 1975) with Trivits v. Wilmington Institute, 383 F.Supp. 457, 10 FEP 1402 (D.C. Del. 1974).

Since no such allegations appear in the Complaint before the Court herein, Defendant's Motion to Dismiss the allegations of 42 U.S.C. §1983 should be granted on this basis.[2/]

Similarly, the provisions of the Fifth and Fourteenth Amendments to the United States Constitution may be invoked by a plaintiff in an employment discrimination case only where "state action" or "color of state law" is asserted in the complaint. Where a plaintiff attempted to imply, as may Plaintiff here, that his cause of action for alleged employment discrimination by a private employer was intrinsically based on purely Constitutional grounds, the Court ruled as follows:

> "Finally, the plaintiff alludes to the First and Fourteenth Amendments as if to suggest that his purported rights are drawn directly from those constitutional provisions. This must also be rejected for the reason that these amendments only afford protection against state action and not conduct purely private in nature. Lloyd Corporation v. Tanner, 407 U.S. 551, 92 S.Ct. 2219 (1972); Adickes v. S. H. Kress and Company, 398 U.S. 144, 90 S.Ct. 1598 (1970); Bond v. Dentzer, 494 F.2d 302 (2nd Cir. 1974); Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Tuck v. McGraw-Hill, Inc., supra. The petition contains no allegations of state involvement and the alleged acts of the defendant are not proscribed by the First and Fourteenth Amendments to the Constitution.
>
> "Accordingly, the complaint fails to state a claim upon which relief can be granted and which is within the subject matter jurisdiction of this court." Barfield v. A.R.C. Security, Inc., supra.

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2/ Where there is such an allegation of state action against what is apparently a "private" corporation such as is Defendant here, the factors the courts consider relating to a decision on the issue of "state action" are as follows:

> "(1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms." Jackson v. Statler Foundation, 496 F.2d 623, 7 FEP 834 (CA2 1974).

It is patently clear that even were such an allegation made in the Complaint, that Defendant, as a purely private enterprise, could not be brought within the above tests for the purpose of establishing the "state action" or "color of state law" criteria for 42 U.S.C. §1983 jurisdiction.



Defendant's motion to dismiss was granted on those grounds. As a private employer, Olinkraft is not directly subject to constitutional restrictions pertaining only to certain governmental activity. Tuck v. McGraw-Hill, Inc., 9 FEP 94 (S.D. N.Y. 1974). Or, otherwise stated, the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." Thomas v. Ford Motor Co., supra, f.n. 19. Therefore, the allegations pertaining to alleged violations of the Fifth and Fourteenth Amendments do not state a claim upon which relief can be granted nor does this Court have subject matter jurisdiction over said claim. They too, then, must be dismissed on this basis.

Absent the allegation of a valid cause of action under 42 U.S.C. §1981 or 42 U.S.C. §1983, the Court has no subject matter jurisdiction under 28 U.S.C. §1343. Smith v. United Press International, supra. There is no federal controversy arising "under the Constitution, laws and treaties of the United States" as contemplated by 28 U.S.C. §1331 where the complaint, as here, does not assert any claim against anyone acting under governmental authority but only against a private corporate employer. Chandler v. O'Bryan, 445 F.2d 1045 (CA10 1971); Farmer v. Philadelphia Electric Co., 329 F.2d 3 (CA3 1964); see, also, Archuleta v. Callaway, 385 F.Supp. 384, 11 FEP 483 (D.C. Colo. 1975). And, it is also clear that the Declaratory Judgment Act, 28 U.S.C. §2201, et. seq., is not jurisdictional in nature and that relief sought thereunder "is alternative or cumulative and not extraordinary or exclusive." Wilson v. Sharon Steel Corp., supra. Thus, Plaintiff, failing to state a proper cause of action under the allegations of her Complaint as herein discussed, is precluded from continuing her suit under the bare independent allegation of 42 U.S.C. §2201, et. seq., as a basis for this Honorable Court's jurisdiction.

Based on all the above, the allegations of the Complaint as they aver jurisdiction or attempt to state a cause of action under 42 U.S.C. §1983, 28 U.S.C. §2201, 1331 and 1343 and the Fifth and Fourteenth Amendments to the United States Constitution should be dismissed.

III. Plaintiff Failed to File Charges with the EEOC within One Hundred Eighty Days of the Alleged Discrimination Against Her

Plaintiff pleads she was promoted to roll handler on October 1, 1974.[3/] Although she was in fact promoted as described in the foregoing footnote, the exact dates of her promotion or promotions are not pertinent except as they reveal that during the material time period preceding the filing of her charge of employment discrimination with the Equal Employment Opportunity Commission, Defendant Clinkraft has not promoted "to better paying jobs males with less seniority than plaintiff, a female qualified for such better paying jobs" as alleged in her Complaint.

Title VII of the Civil Rights Act of 1964, as amended, states at Section 706(e) that "(a) charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...." Plaintiff filed her charge on March 5, 1975. (A copy thereof is attached as Exhibit A to Defendant's Motion to Dismiss.) The Court is requested to take official notice that the period one hundred eighty days prior to that period began on September 6, 1974.

Even assuming that the charge of failing to promote an employee validly raises a "continuing violation" of Title VII, it is apparent from her Complaint, and from the exhibits to this Memorandum, that there was no failure to promote Ms. Clark within the material time period. Neither was there a failure to pay her the appropriate wage scale.

The Fifth Circuit Court of Appeals has recently held that the one hundred eighty day period operates as a "statute of limitations" rather than "jurisdictionally." Reeb v. Economic Opportunity Atlanta, 516 F.2d 924, 11 FEP 235 (CA5 1975). The court there ruled that "the statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent

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3/Defendant's records reveal that she was in fact promoted to the following jobs on the dates as outlined below. To roll handler, September 8, 1974 (Exhibit #1); to press operator helper, October 7, 1974 (retroactive to September 8, 1974) (Exhibit #2); to press operator, August 9, 1975 (Exhibit #3). Company records of these promotions are attached hereto as Exhibits 1, 2, and 3. Attached as Exhibit 4 are pages from the collective bargaining agreement between Defendant and United Paperworkers International Union, Local 654, which reveals the line of progression and wage rates in effect in the plant where Plaintiff is now employed. These pages reveal she is classified in the second highest job in her line of progression and a comparison of Exhibits 1, 2, and 3 with the attached wage rates reveals she was paid the proper contractual wage scale, as were all other male and female employees, for the job classification she held during this period.



to a person with a reasonably prudent regard for his rights." It is apparent from Plaintiff's allegations that the only events occurring within the period of the statute of limitations were her promotion or promotions. She seems to claim that during some undefined period prior to that time, the company promoted on a sexually discriminatory basis. There is certainly no logic to extending the statutory period in an action for a failure to promote beyond September 6, 1974, which is otherwise the appropriate cutoff date, where since that time Plaintiff has been promoted on three occasions, and has not, according to her pleading, been declined a promotion on any occasion.

The Fifth Circuit Court of Appeals has ruled, since its decision in Reeb v. Economic Opportunity Atlanta, supra, as follows on the statute of limitations issue:

> "In sum, filing with the EEOC is a jurisdictional prerequisite to federal court consideration of a discrimination claim under Title VII, and the filing in the current case was not timely in regard to any alleged June 1967 act. For this reason, any action based on the 1967 claim should have been dismissed." East v. Romine, Inc., 518 F.2d 332, 11 FEP 300 (CA5 1975).

In explaining its declination to use the Reeb doctrine in that case, the Court wrote:

> "We have recently held that the statutory filing time limit is not jurisdictional but rather in the nature of a statute of limitations and that such a period does not begin to run until the facts that would support a charge of discrimination under Title VII are apparent or should be apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff. Reeb v. Economic Opportunity Atlanta, Inc., 5 Cir. 1975, 516 F.2d 924, 11 FEP Cases 235. In the present case, however, there are no indications that the bases of a charge of discrimination were unknown to the plaintiff until after the alleged discriminatory incident took place. The regular filing deadline is therefore applicable." East v. Romine, Inc., supra, f.n. 3.

In a well-reasoned opinion on how a plaintiff should be required to satisfy the one hundred eighty day requirement of Title VII, Honorable District Court Judge Richard C. Freeman wrote as follows: "Plaintiff could satisfy this requirement by proving that 'either an overt act of discrimination or a continuing pattern and practice of discrimination occurred within 180 days of the filing of her EEOC complaint.'" Stroud v. Delta Air Lines, Inc., 392 F.Supp. 1184, 1191, 10 FEP 314, 498 (N.D. Ga. 1975). Plaintiff's complaint here only alleges one specific fact

which the Court might utilize to determine whether the one hundred eighty day requirement has been met. That is that she was promoted on October 1, 1974.[1/] It is certainly not "an overt act of discrimination" that Plaintiff was promoted from feeder-grabber to roll handler. Neither does her promotion reveal a "continuing pattern and practice of discrimination." Thus, not having met the "statute of limitations" requirements of Title VII, and there being no extraordinary circumstances for modifying those requirements, Plaintiff's Complaint should be dismissed on that basis.

Many other courts have dismissed such cases for plaintiff's failure to file an EEOC charge within the one hundred eighty day period. E.g., Bell v. Eastern Greyhound Lines, 11 FEP 278 (D.C. D.C. 1975); Doski v. M. Goldseker Co., 11 FEP 469 (D.C. Md. 1975); Buckingham v. United Air Lines, 11 FEP 348 (C.D. Cal. 1975); Davidson v. Tapley, 11 FEP 573 (S.D. N.Y. 1975); Mason v. Owens-Illinois, Inc., 11 FEP 441 (S.D. Ohio 1974). The same result should follow here.

Therefore, Plaintiff, having failed to file her charge until more than one hundred eighty days after the alleged discrimination against her, has not fulfilled the requirements of Section 706(e) of Title VII of the Civil Rights Act of 1964, as amended. The Complaint does not state a claim for which relief can be granted and must be dismissed.

IV. Conclusion

Wherefore, Defendant Clinkraft respectfully requests this Honorable Court to dismiss each and every allegation of the Complaint based on the foregoing reasons and authorities. The Complaint does not state a claim upon which relief can be granted; neither does it assert a proper basis for invoking the jurisdiction of this Court.

Respectfully submitted,

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West Monroe, Louisiana 71291

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1500 First National Bank of Commerce Building
New Orleans, Louisiana 70112

November 7, 1975

COUNSEL FOR DEFENDANT CLINKRAFT, INC.

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[1/] Defendant Clinkraft's records reveal Plaintiff was promoted on September 9, 1974. See Exhibit #1 to this Memorandum.



NOTIFICATION OF EMPLOYEE STATUS

Carton Division #70 — EMPLOYMENT — [X] CHANGE IN STATUS — TERMINATION

Clark, Mary Evelyn — 222 — 436-62-5848 — 9/27/74

TYPE OF ACTION: [X] PROMOTION

3/12/66

| EFFECTIVE | ACCT. NO | DIVISION AND DEPARTMENT | TYPE INCR | TITLE AND CODE | GRADE | RATE |
|---|---|---|---|---|---|---|
| 8 9/29/74 | 70 | Creases | | Roll Tender | | 3.805 |
| 11/1/73 | 70 | Finishing | | Feeder-Grabber | | 3.545 |
| 11/1/73 | 70 | Finishing | | Feeder-Grabber | | 3.265 |

Training for 4thpress.

RIC PERSONNEL POLICY 2.5 FOR DISTRIBUTION

EXHIBIT #1

A-46

NOTIFICATION OF EMPLOYEE STATUS

Carton Plant 70 | ☐ EMPLOYMENT | ☒ CHANGE IN STATUS | ☐ TERMINATION

Clark, Mary Evelyn | 227 | 434-62-5348 | 10/7/74

☐ MALE ☐ FEMALE | ☐ SINGLE ☐ MARRIED ☐ DIVORCED ☐ WIDOWED ☐ SEPARATED | ☒ HOURLY ☐ SALARY NON-EX ☐ SALARY EX

TYPE OF ACTION: ☐ NEW HIRE ☐ RE-INSTATE ☐ REPLACEMENT ☐ LATERAL TRANSFER ☐ DEMOTION ☐ ACCOUNT CHANGE ☐ OTHER
☐ RE-HIRE ☐ ADDITION ☐ TEMPORARY ☒ PROMOTION ☐ SALARY CHANGE ☐ LEAVE OF ABSENCE

3/12/64

| | EFFECTIVE | ACCT. NO. | DIVISION AND DEPARTMENT | TYPE INCR | TITLE AND CODE | GRADE | RATE |
|---|---|---|---|---|---|---|---|
| NEW | 9/8/74 | 70 | Grainers | | Assistant Pressman | | 3.715 |
| PRESENT | 9/8/74 | 70 | Grainers | | Roll Tender | | 3.605 |
| PREVIOUS | | | | | | | |

Training on 4th press.

10/7/74

SEE PERSONNEL POLICY 13 FOR DISTRIBUTION

EXHIBIT #2

A-47

NOTIFICATION OF EMPLOYEE STATUS

Carton Plant 70 | ☐ EMPLOYMENT | ☒ CHANGE IN STATUS | ☐ TERMINATION

Clark, Mary E. | 222 | 434-62-5348 | 8/13/73

☐ MALE ☒ FEMALE | ☐ SINGLE ☒ MARRIED ☐ DIVORCED ☐ WIDOWED ☐ SEPARATED | ☒ HOURLY ☐ SALARY NON-EX ☐ SALARY EX

TYPE OF ACTION: ☐ NEW HIRE ☐ RE-INSTATE ☐ REPLACEMENT ☐ LATERAL TRANSFER ☐ DEMOTION ☐ ACCOUNT CHANGE ☐ OTHER
☐ RE-HIRE ☐ ADDITION ☐ TEMPORARY ☒ PROMOTION ☒ SALARY CHANGE ☐ LEAVE OF ABSENCE

3/12/74

| | EFFECTIVE | ACCT. NO | DIVISION AND DEPARTMENT | TYPE INCR | TITLE AND CODE | GRADE | RATE |
|---|---|---|---|---|---|---|---|
| NEW | 9/9/72 | 70 | Grainers | | Press Operator | Start | 4.805 |
| PRESENT | 4/8/73 | 70 | Grainers | | Press Operator Helper | Exp. | 4.15 |
| PREVIOUS | | | | | | | |

Promotion due to set up of Leadman on 6 month trial.

Billy W Brooks 5/13/73

SEE PERSONNEL POLICY 13 FOR DISTRIBUTION

EXHIBIT #3

MEMORANDUM ATTACHMENT NO. V

WAGE SCHEDULE

CARTON DIVISION

| Job Classifications: | Effective 10-1-74 | Effective 11-1-75 | Effective 11-1-76 |
|---|---|---|---|
| **PRINTING DEPARTMENT:** | | | |
| Lead Operator (When Used) | 25c above base rate | | |
| Press Operator | | | |
| After 2 Years | $5.335 | $5.870 | $6.455 |
| After 1 Year | 5.165 | 5.680 | 6.250 |
| After 8 Months | 4.995 | 5.495 | 6.045 |
| Start | 4.805 | 5.285 | 5.815 |
| Ink Mixer | 4.620 | 5.080 | 5.590 |
| Press Operator Helper | | | |
| After 2 Years | 4.455 | 4.900 | 5.390 |
| After 1 Year | 4.250 | 4.675 | 5.140 |
| After 8 Months | 4.160 | 4.575 | 5.030 |
| Start | 4.085 | 4.495 | 4.945 |
| Roll Handler | 3.945 | 4.360 | 4.795 |
| Grabber | 3.870 | 4.258 | 4.680 |

In addition to their rate, Press Operator and Press Operator Helper will receive for press makeready and run time:

| | |
|---|---|
| 4 Colors | .05 |
| 5 Colors | .06 |
| 6 Colors | .09 |
| 7 Colors | .12 |
| 8 Colors | .15 |

Press Operator and Press Operator Helper will receive 10c per hour in addition to their base rate when assigned to work on the Old Zerand Press effective November 1, 1972.

| | | | |
|---|---|---|---|
| **Makeready** | | | |
| Cylinder Shop Operator | | | |
| After 2 Years | 5.335 | 5.870 | 6.455 |
| After 1 Year | 5.165 | 5.680 | 6.250 |
| Start | 4.995 | 5.495 | 6.045 |
| Assistant Cylinder Shop Operator | | | |
| After 2 Years | 4.805 | 5.285 | 5.815 |
| After 1 Year | 4.710 | 5.180 | 5.700 |
| Start | 4.600 | 5.060 | 5.565 |



EXHIBIT #4



| Job Classifications: | Effective 10-1-74 | Effective 11-1-75 | Effective 11-1-76 |
|---|---|---|---|
| **Makeready** | | | |
| After 3 Years | $4.495 | $4.945 | $5.440 |
| After 2 Years | 4.370 | 4.805 | 5.285 |
| After 1 Year | 4.270 | 4.695 | 5.165 |
| Start | 4.160 | 4.575 | 5.030 |
| **Utility** | | | |
| After 2 Years | 4.095 | 4.505 | 4.955 |
| After 1 Year | 4.025 | 4.425 | 4.865 |
| After 8 Months | 3.955 | 4.350 | 4.785 |
| Start | 3.925 | 4.315 | 4.745 |
| **Die Room** | | | |
| Lead Die Maker | 5.535 | 6.090 | 6.700 |
| Die Maker | | | |
| After 4 Years | 5.110 | 5.620 | 6.180 |
| After 3 Years | 4.855 | 5.340 | 5.875 |
| After 2 Years | 4.670 | 5.135 | 5.650 |
| After 1 Year | 4.455 | 4.900 | 5.390 |
| After 8 Months | 4.225 | 4.645 | 5.110 |
| Start | 4.180 | 4.545 | 5.000 |
| Helper | 3.875 | 4.260 | 4.685 |
| **Finishing:** | | | |
| Operator - Makeready | 5.125 | 5.635 | 6.200 |
| Glue Machine Operator | | | |
| After 2 Years | 4.940 | 5.435 | 5.980 |
| After 1 Year | 4.655 | 5.120 | 5.630 |
| After 3 Months | 4.500 | 4.950 | 5.445 |
| Start | 4.360 | 4.795 | 5.275 |
| In-Process Handler | 3.820 | 4.200 | 4.620 |
| Feeder-Grabber | | | |
| After 3 Months | 3.900 | 4.290 | 4.720 |
| Start | 3.695 | 4.065 | 4.470 |
| **Shipping** | | | |
| Lead Checker (When Used) | 25c above base rate | | |
| Checker | | | |
| After 1 Year | 4.625 | 5.085 | 5.595 |
| After 3 Months | 4.455 | 4.900 | 5.390 |
| Start | 4.365 | 4.800 | 5.280 |

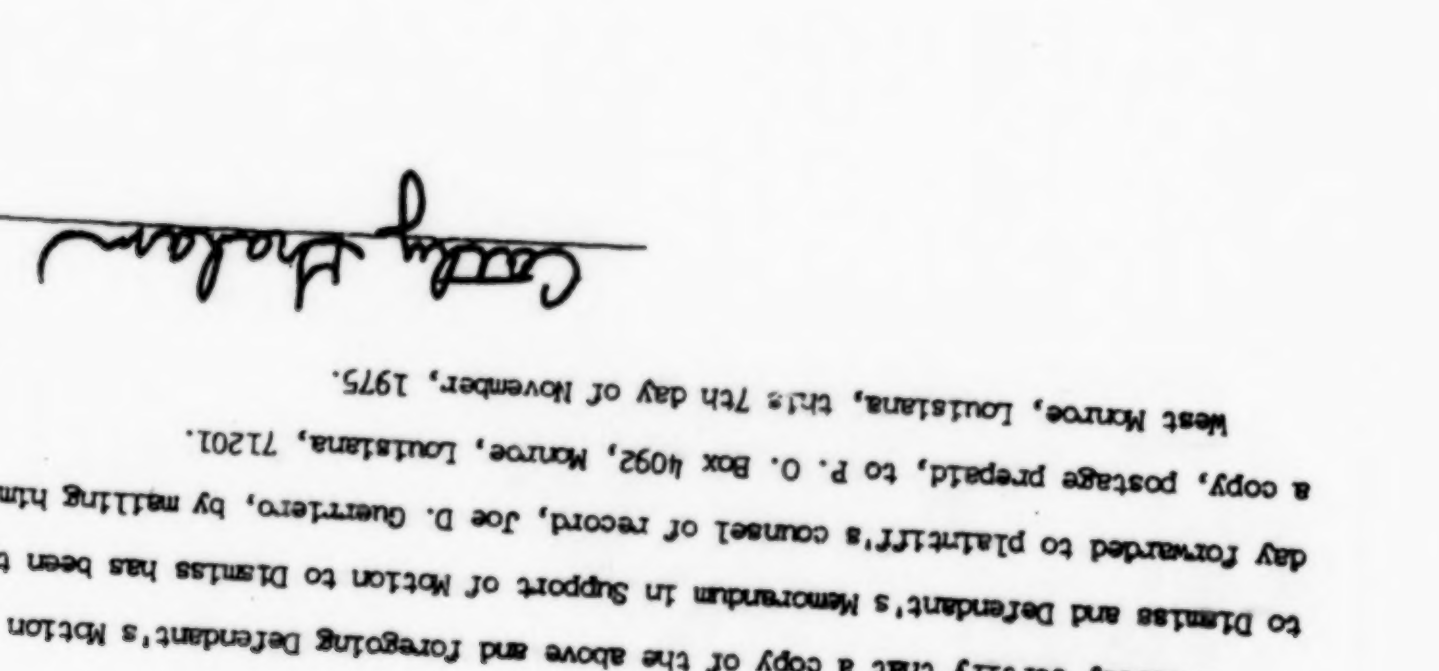
| Job Classifications: | Effective 10-1-74 | Effective 11-1-75 | Effective 11-1-76 |
|---|---|---|---|
| **Makeready** | | | |
| After 3 Years | $4.495 | $4.945 | $5.440 |
| After 2 Years | 4.370 | 4.805 | 5.285 |
| After 1 Year | 4.270 | 4.695 | 5.165 |
| Start | 4.160 | 4.575 | 5.030 |
| **Utility** | | | |
| After 2 Years | 4.095 | 4.505 | 4.955 |
| After 1 Year | 4.025 | 4.425 | 4.865 |
| After 3 Months | 3.955 | 4.350 | 4.785 |
| Start | 3.925 | 4.315 | 4.745 |
| **Die Room** | | | |
| **Lead Die Maker** | 5.535 | 6.090 | 6.700 |
| **Die Maker** | | | |
| After 4 Years | 5.110 | 5.620 | 6.180 |
| After 3 Years | 4.855 | 5.340 | 5.875 |
| After 2 Years | 4.670 | 5.135 | 5.650 |
| After 1 Year | 4.455 | 4.900 | 5.390 |
| After 3 Months | 4.225 | 4.645 | 5.110 |
| Start | 4.130 | 4.545 | 5.000 |
| **Helper** | 3.875 | 4.260 | 4.685 |
| **Finishing:** | | | |
| **Operator - Makeready** | 5.125 | 5.635 | 6.200 |
| **Glue Machine Operator** | | | |
| After 2 Years | 4.940 | 5.435 | 5.980 |
| After 1 Year | 4.655 | 5.120 | 5.630 |
| After 3 Months | 4.500 | 4.950 | 5.445 |
| Start | 4.360 | 4.795 | 5.275 |
| **In-Process Handler** | 3.820 | 4.200 | 4.620 |
| **Feeder-Grabber** | | | |
| After 3 Months | 3.900 | 4.290 | 4.720 |
| Start | 3.695 | 4.065 | 4.470 |
| **Shipping** | | | |
| **Lead Checker (When Used)** | 25c above base rate | | |
| **Checker** | | | |
| After 1 Year | 4.625 | 5.085 | 5.595 |
| After 3 Months | 4.455 | 4.900 | 5.390 |
| Start | 4.365 | 4.800 | 5.280 |





| Job Classifications: | Effective 10-1-74 | Effective 11-1-75 | Effective 11-1-76 |
|---|---|---|---|
| **Lift Truck Driver** | $4.330 | $4.765 | $5.240 |
| **Stock Handler** | 4.475 | 4.920 | 5.410 |
| **Case Handler** | 4.475 | 4.920 | 5.410 |
| **Waste Baler** | 4.025 | 4.425 | 4.865 |
| **Conveyor Operator** | | | |
| After 3 Months | 4.020 | 4.420 | 4.860 |
| Start | 3.900 | 4.290 | 4.720 |
| **Caser Palletizer** | | | |
| After 3 Months | 3.785 | 4.165 | 4.580 |
| Start | 3.745 | 4.120 | 4.530 |
| **Quality Control** | | | |
| Inspector | 4.090 | 4.500 | 4.950 |
| **General** | | | |
| Miscellaneous Labor | 3.745 | 4.120 | 4.530 |
| Clean Up | 3.865 | 4.250 | 4.675 |
| **Maintenance** | | | |
| Lead Mechanic | 6.590 | 7.250 | 7.975 |
| **Mechanic** | | | |
| Advancement not to exceed 12 Months | 6.115 | 6.725 | 7.395 |
| exceed 6 Months | 5.370 | 5.905 | 6.495 |
| Start | 5.050 | 5.555 | 6.110 |
| **Electrician** | | | |
| Advancement not to exceed 2 Years | 6.115 | 6.725 | 7.395 |
| exceed 18 Months | 5.680 | 6.250 | 6.875 |
| exceed 1 Year | 5.465 | 6.010 | 6.610 |
| exceed 6 Months | 5.465 | 6.010 | 6.610 |
| Start | 5.350 | 5.885 | 6.475 |
| **Utility Repair** | | | |
| After 18 Months | 5.105 | 5.615 | 6.175 |
| After 12 Months | 4.790 | 5.270 | 5.795 |
| After 6 Months | 4.495 | 4.945 | 5.440 |
| Start | 4.200 | 4.620 | 5.080 |
| **Oiler** | 4.410 | 4.850 | 5.335 |

## LINES OF PROGRESSION — CARTON DIVISION




NOTE: In the above lines of progression of jobs having time step rates, employees will be advanced from the rate they are receiving to the next highest rate in the succeeding job and shall receive credit on the time rate to which they are advanced for time spent in the time step rate from which they are advanced excepting that employees who are advanced from the top step rate in a job shall not receive any credit for time spent in the top rated job on the time step rate to which they are advanced. The foregoing procedure shall not apply on any jobs which require service for a period of three months before the top rate of the job.

A-53

C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing Defendant's Motion to Dismiss and Defendant's Memorandum in Support of Motion to Dismiss has been this day forwarded to plaintiff's counsel of record, Joe D. Guerriero, by mailing him a copy, postage prepaid, to P. O. Box 4092, Monroe, Louisiana, 71201.

West Monroe, Louisiana, this 7th day of November, 1975.

# APPENDIX I - Answer ot Olinkraft, Inc and Attachments

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

MARY EVELYN CLARK

VERSUS

OLINKRAFT, INC.

Civil Action No. 751088

ANSWER

NOW COMES Olinkraft, Inc. (herein referred to as Olinkraft), Defendant in the above-styled case, and in answer to the Complaint states as follows:

1.

Defendant Olinkraft denies that the Court has jurisdiction over this cause under 28 U.S.C. §1331, 28 U.S.C. §1343, and 28 U.S.C. §2201. Defendant Olinkraft denies that this suit is authorized under 42 U.S.C. §1981, 42 U.S.C. §1983, and the Fifth and Fourteenth Amendments of the United States Constitution. Defendant Olinkraft, Inc., denies that this suit is authorized under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et. seq. The remainder of the allegations of paragraph 1 of the Complaint consists of other conclusions of law which are not subject to answer, but, insofar as they may be construed to contain allegations of fact, they are hereby denied.

2.

Defendant Olinkraft admits the allegations of paragraph 2 of the Complaint.

3.

Defendant Olinkraft admits the allegations of paragraph 3 of the Complaint.

4.

Defendant Olinkraft denies the allegations of paragraph 4 of the Complaint.



Defendant Olinkraft denies the allegations of paragraph 5 of the Complaint. Defendant Olinkraft affirmatively pleads that Plaintiff was hired on March 12, 1964, in the Packaging Division of its West Monroe, Louisiana, facilities and as a laborer in the Carton Plant then and now designated by the company as Plant #70. On June 12, 1964, she was promoted to feeder-grabber in the Finishing Department of that plant. On September 8, 1974, Plaintiff was promoted to roll tender in the Gravure Department. She was trained as an assistant pressman, and on October 7, 1974, she was promoted to press operator helper in the Gravure Department. This promotion was made retroactive to September 8, 1974. On August 9, 1975, Plaintiff was promoted to press operator in the Gravure Department. Press operator is next to the top job in the line of progression to which Plaintiff is assigned. It is specifically denied that at any time material hereto, Defendant Olinkraft has promoted to a higher paying job a male employee with less seniority than Plaintiff; it is specifically denied that at any time material hereto, Defendant Olinkraft has paid males with less seniority a greater salary for performing the same job as Plaintiff.

6.

Defendant Olinkraft admits the allegations of paragraph 6 of the Complaint. Defendant Olinkraft affirmatively pleads that the charge filed by Plaintiff (a copy of which is attached hereto as Attachment A) was filed on March 5, 1975.

7.

Defendant Olinkraft admits the allegations of paragraph 7 of the Complaint.

8.

The allegations of paragraph 8 of the Complaint consist entirely of prayers for relief which are not subject to answer but, insofar as they might be construed to contain allegations of fact, they are hereby denied.

IN FURTHER ANSWER to the Complaint, Defendant Olinkraft alleges the following affirmative defenses:

9.
First Defense

Under 42 U.S.C. §1981, the Court lacks jurisdiction over the subject matter of the Complaint and the Complaint does not state a claim for which relief can be granted because it alleges employment discrimination based on Plaintiff's sex which is not prohibited by that statute.

10.
Second Defense

Under 42 U.S.C. §1983, the Court lacks jurisdiction over the subject matter of the Complaint and the Complaint fails to state a claim upon which relief can be granted because that statute does not apply to private employers and the conduct complained of was not engaged in under color of state law.

11.
Third Defense

Any right or cause of action alleged in paragraph 5 of the Complaint to have existed in Plaintiff in regard to promotions and wages under 42 U.S.C. 2000e, et. seq., is barred by 42 U.S.C. 2000e - 5(e) because Plaintiff's charge with the Equal Employment Opportunity Commission was not filed within one hundred eighty days after the date on which the alleged unlawful employment practices occurred.

12.
Fourth Defense

Defendant Olinkraft is not subject to the Fifth and Fourteenth Amendments of the United States Constitution; no state action is alleged in the Complaint, nor is or was any state action involved in the promulgation or enforcement of the promotion and wage policies which are claimed therein to be unlawful.

13.
Fifth Defense

During all times material herein, Defendant Olinkraft's promotion and wage policies in regard to certain women employees were, and are, governed under the provisions of a settlement agreement between it and the United States Equal Employment Opportunity Commission; United Paperworkers International Union, Local #654, AFL-CIO; and eleven female charging parties in Case Nos. TN02 0920, etc. This settlement agreement is dated December 13, 1974, and a copy thereof is attached hereto as Exhibit B. Plaintiff is and was a member of the class of female employees covered by that agreement and a member of the "affected class" of female employees defined





therein, and is thereby barred and estopped from maintaining this action for relief which would be merely duplicitous of the relief therein granted.

14.
Sixth Defense

The Plaintiff herein was treated in accord with uniform company rules and policies, as are all employees of Olinkraft regardless of sex, by virtue of the collective bargaining agreement between Olinkraft and United Paperworkers International Union and its Local #654 and/or legitimated and recognized reasons of business necessity.

15.
Seventh Defense

The rules, policies, and practices of Defendant Olinkraft as set out in paragraph 14 above, are uniform for all employees, male and female, and the rules, policies, and practices were, and are, applied to this Plaintiff and all employees in a uniform, fair, and nondiscriminatory manner without regard to sex.

16.
Eighth Defense

Defendant Olinkraft has contracted by the collective bargaining agreement referred to in paragraph 14, above, as supplemented by the settlement agreement referred to in paragraph 13, above, to a system of promotions for a certain "affected class" of women employees, including Plaintiff, which system is based on their company seniority and under this system, Plaintiff was and has been promoted on the same and equal basis with all employees covered thereunder and was and has been promoted ahead of employees who are not covered thereunder.

17.
Ninth Defense

Defendant Olinkraft has contracted by the collective bargaining agreement set out in paragraph 14, above, to a scale of wage or salary payment which applies to all employees equally, regardless of sex, and under this scale of payment, Plaintiff was paid on the same and equal basis with all employees, male and female, covered under said agreement.

18.
Tenth Defense

If 42 U.S.C. §1981 and 42 U.S.C. §1983 are held to otherwise have any bearing on the issues herein, Defendant Oliviraft believes and therefore avers that any right or cause of action for back pay or otherwise which may have existed in Plaintiff has prescribed pursuant to the provisions of Articles 3536 and 3536 of the Louisiana Civil Code.

19.
Eleventh Defense

By virtue of Section 706(g) of Title VII of the Civil Rights Act of 1964, as amended, Oliviraft is not bound to pay Plaintiff any back pay, because she has not been assigned lower paying jobs than were males, and she has not been refused job advancement because of her sex. Defendant Oliviraft has not engaged in, nor is it engaging in any employment practices whereunder Plaintiff or any other female employee was or is discriminated against with respect to promotion and wages because of her sex, and Defendant Oliviraft had adhered to and is adhering to the same standards for all employees with respect to promotion and wages.

20.
Twelfth Defense

Oliviraft has treated and has continued to treat Plaintiff and all other employees in a fair and nondiscriminatory manner without regard to their sex, in regard to all of their terms and conditions of employment.

**WHEREFORE**, having fully answered the allegations of the Complaint, Oliviraft prays that the Complaint be dismissed and for such other and further relief as may appear to the Court to be just and proper, including the assessment of reasonable attorneys' fees as provided for in Section 706(k) of the Civil Rights Act of 1964, as amended.

Respectfully submitted,

Peyton Talley, IV.
Labor Counsel
Oliviraft, Inc.
P. O. Box 4092
West Monroe, Louisiana 71291
318/325-5511, extension 111

O. Phillip Shuler
Gaffe, Mccall, Phillips, Toler & Sarpy
1500 First National Bank of Commerce Building
New Orleans, Louisiana 70112

COUNSEL FOR DEFENDANT OLIVIRAFT, INC.



**CERTIFICATE**

I hereby certify that a copy of the above and foregoing Defendant's Answer to the Complaint has been this day forwarded to plaintiff's counsel of record, Joe D. Cazzieiro, by mailing him a copy, postage prepaid, to P. O. Box 4092, Monroe, Louisiana, 71201.

West Monroe, Louisiana, this 10th day of November, 1975.

Cathy Graham

(PLEASE PRINT OR TYPE)

EEOC

| | |
|---|---|
| CHARGE OF DISCRIMINATION | 462-5-1647-9 |
| Mrs Mary Evelyn Clark | |
| La 71225 Oneshita | |
| Route 1, Box 2nd Calhoun La 71225 | SS. 434.2528 |
| Mr Betty J Gilliam | SS. 434.8198 |
| Wife Husband | West Monroe La 71291 |
| Olin Kraft | SS 525.5811 |
| Jonesboro Road | West Monroe La 71291 |

Refer to the pages enclosed.

| | |
|---|---|
| 8.5.74 | Mary E Clark |
| | 8 March 1974 |
| | Mary E Clark |

EXHIBIT A



Mary E. Clark
Rt. 1, Box 2nd St
Louisiana, 71225

Dear Sirs:

I have been working at Olinkraft for two years and I have been employed as Janitor. Recently I have been given the same thing. I have been allowed more breaks and more rest periods than the rest of the janitors. I have been eliminated, as far as I know, as a male janitor. I was asked one day by my supervisor if I would like to go work in the Maintenance Department. I told him I would like to go work in the Maintenance Department, but I replied that I was already doing this kind of work. I was told by the A.C. Supervisor that I would be given a chance to go in the Maintenance Department, but I have not been given that opportunity. I was told by the A.C. Supervisor that I would be given a chance to go in the Maintenance Department, but I have not been given that opportunity. I was told by the A.C. Supervisor that I would be given a chance to go in the Maintenance Department, but I have not been given that opportunity.

machine I had never worked on before, and was expected to operate it with 2 weeks training. The youngest man on that machine with only 3 months training for himself was put on to train me. I feel also he wont give me the proper training because I will be taking his job and he will be bumped back to Assistant Pressman.

I feel I have been deprived of a lot of money as of February 27, 1975 when I was finally put up to Press Operator. I think I should be paided back wages for all the time I was not allowed to work on the Press.

Yours Truly
Mary C. Clark

NEW ORLEANS DISTRICT OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
[illegible] CANDLER STREET
NEW ORLEANS, LOUISIANA 70130

**PRE-DETERMINATION SETTLEMENT**

In the Matter of:

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

and

INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPER MILL WORKERS, AND ITS LOCAL 634

GLORIA ALBRITTON
ROLA WHEELIS
ANNIE D. EDWARD
OZEE LINLIE (DAIDSON)
FRANCIS FREEMAN
DOROTHY PARKER
MARGIE MORGAN
VIRGINIA CAMPBELL (CROWELL)
ANNINE ASTLEY
MARTHA CROWELL
MARINE FULLER

Charges No. [illegible]

Cases #790 & 818

Charging Parties

and

OLINKRAFT, INC.
West Monroe, Louisiana
Respondent

Charges having been filed under Title VII of the Civil Rights Act of 1964, as amended, with the U. S. Equal Employment Opportunity Commission, by the Charging Parties against the Respondent, there having been a preliminary investigation, the parties do resolve and settle the above-numbered charges as follows:

EXHIBIT B



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| II | Specific Provisions | 5 |
| III | Signatures | 8 |

I. GENERAL PROVISIONS

1. The Respondent agrees that the Commission, on request of the Charging Parties or on its own motion, may review compliance with this Agreement. As a part of such review the Commission may require written reports concerning compliance, may inspect the premises, examine witnesses, and examine and copy all relevant documents.

2. It is understood that this Agreement does not constitute an admission by the Respondent that it has in any way violated nor has it been found to have violated Title VII of the Civil Rights Act of 1964, as amended.

3. The Charging Parties and all parties signatory hereto hereby waive, release and covenant not to sue the Respondent with respect to any matters which were or might have been alleged as charges filed with the Equal Employment Opportunity Commission, subject to performance by the Employer of the promises and representations contained herein.

4. All the Respondent's hiring, promotion practices, and other terms and conditions of employment shall continue to be maintained and conducted in a manner which does not discriminate on the basis of race, color, sex, religion or national origin in violation of Title VII of the Civil Rights Act of 1964, as amended.

5. The Respondent agrees that all facilities on the premises shall continue to be available for the use of any employee without regard to race, color, religion or national origin; that there shall continue to be no discrimination against any employee on said ground with respect to the use of facilities, and that the notice required to be posted by Title VII of the Civil Rights Act of 1964, as amended, will continue to be posted.



6. The Respondent agrees that there shall continue to be no discrimination or retaliation of any kind against any person because of opposition to any practice declared unlawful under Title VII of the Civil Rights Act of 1964, as amended, or because of the filing of a charge; giving of testimony or assistance; or participation in any manner in any investigation, proceeding or hearing under Title VII of the Civil Rights Act of 1964, as amended.

7. It is mutually agreed that this Agreement shall become effective as of the date all parties hereto have executed same and the Commission has approved the entire Agreement. It is further agreed that its General Provisions shall remain in effect for a period of three (3) years and its Specific Provisions shall remain in effect for the periods specified in paragraph II, A(4), herein.

8. It is expressly understood and agreed by the parties hereto that there shall be no written publication respecting this matter which specifically identifies the parties named herein.

9. The Employer agrees to report in writing to the District Director, Equal Employment Opportunity Commission, New Orleans District Office, Masonic Temple Bldg., 333 St. Charles Avenue, Room 1711, New Orleans, LA, 70130, when it has complied with this agreement. The Employer agrees to include all pertinent documentation showing who has benefitted from this agreement.

10. The charging parties and the Commission agree that the approval of this settlement agreement by the Commission will halt the Commission's processing of these charges except as specified in Section I, paragraph 1 and 9, above.

II. SPECIFIC PROVISIONS

A. The following provisions of the agreement between the company and the charging unions dated August 12, 1974, are hereby incorporated into this settlement agreement as follows:

1. The female affected class are those female employees in the bargaining unit represented by United Paperworkers International Union and its Local 654 who were employed by Olinkraft prior to July 1, 1965.

2. All parties agree that Company seniority will be substituted for job seniority in cases of promotions, demotions, layoffs, and recalls whenever one or more affected class female employee is competing with other employees. All parties further agree that Company seniority will be substituted for job seniority in cases of promotions, demotions, layoffs and recall where an affected class female employee is competing with another affected class female employee. "Company seniority" is defined as an employee's total length of continuous service in converting plants operated by Olinkraft, Inc., in West Monroe, Louisiana.

3. Members of the affected class who transfer under current applicable procedures in the labor agreement will be afforded rate protection as follows:

(a) When a member of the female affected class transfers to a job in another line of progression in which the highest paying job exceeds the rate for the highest paying job in the line transferred from, she shall be paid the straight-time hourly rate of pay currently in effect for her permanent position immediately prior to the transfer (herein called "red circle rate") unless or until:



(1) She is permanently assigned to a position with a higher rate, or

(2) She waives or is disqualified from promotion which, in either event, all "red circle" rights cease.

(b) In no event shall such "red circle" rate exceed $3.99 per hour.

(c) The "red circle" rate applies only to one voluntary transfer for each member of the female affected class.

(d) If by shutdown or by other events over which she has no control a "red circle" member of the class is bumped out of the line to which she transfers, she will retain her "red circle" rate subject to (1) and (2) of paragraph (a) above. In the event the "red circle" employee is laid off and is recalled in accordance with the provisions of the labor agreement, such employee will resume the "red circle" rate subject to (1) and (2) of paragraph (a) above.

4. The provisions of paragraphs 1 and 2 above will terminate May 13, 1980, and the provisions of paragraph 3 will apply only to transfers made within three years from August 12, 1974.

B. Further the parties agree as follows:

1. The eleven individual charging parties will be paid the amount of $ which makes them whole for any alleged past mistakes in computing their seniority and for any other discrimination which was or may have been alleged in their charge. The eleven individual charging parties agree that pursuant to their request, they will divide the money equitably among themselves. Their division of this money has been agreed among by the eleven individual charging parties as specified in their letter of December 10, 1974, to Commissioner Conciliator Robert A. Ray. As soon as possible, but no later than three weeks after notification that the District Director of the Commission has approved the agreement, the company will issue checks to the eleven individual charging parties in the amount specified in their letter to Mr. Ray.

2. The charging party unions and the eleven individual charging parties agree that their proper job classification is the job classification in which they are permanently classified on the date of this agreement.
3. The company agrees that all the individual charging parties who are entitled will receive step rate increases just as if they had been promoted on the date they contend they should have been promoted. The charging party and the eleven individual charging parties agree that their present seniority and the above step rate increases reflect the correct computation under the labor agreement and this settlement agreement.
4. All parties agree that the provisions of this settlement agreement are in compliance with the Civil Rights Act of 1964, as amended, and the Commission guidelines pertaining thereto.
5. It is understood that this agreement does not constitute an admission by the Respondent that it has in any way violated nor has it been found to have violated Title VII of the Civil Rights Act of 1964, as amended.



I have read the foregoing Pre-determination Settlement and I accept and agree to the provisions contained therein:

Date 12-11-74 — F. C. Mizell, Vice President, Multiple Packaging - Cartons, Olinkraft, Inc. - Respondent

Date 12-11-74 — Marvin L. Smith, Vice President, Administration, Olinkraft, Inc. - Respondent

Date 12-10-74 — Billy V. Brown, President, Local No. 654

Date 12-11-74 — Hally Phillips, International Representative

Date 12-10-74 — Gloria Albritton

Date 12-10-74 — Nola Mosalis

Date 12-10-74 — Annie B. Stevens

Date 12-10-74 — Ossie Ingles (Bridges)

Date 12-10-74 — Francis Freeman

Date 12-10-74 — Dorothy Parker

Date 12-10-74 — Margie Morgan

Date 12/10/74 — Audine Bailey

Date — Martha Crowell

Date 12-10-74 — Martha Fuller
Charging Parties

I recommend approval of this Pre-determination Settlement Agreement:

Date 12-10-74 — Robert A. Ray, Conciliator

I concur in the above recommendation for approval of this Pre-determination Settlement:

Date 12-10-74 — James W. Gonsoulin
Supervisor of Conciliations

Approved on behalf of the Commission:

Date 12-12-74 — Glenn P. Clason
District Director



# APPENDIX J - Deposition of Mary Evelyn Clark and Attachments

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

MARY EVELYN CLARK
Plaintiff

V.

OLINKRAFT, INC.
Defendant

CIVIL ACTION NO. 751088

Discovery deposition of Ms. Mary Evelyn Clark, the plaintiff, whose deposition was taken by the defendant, and taken pursuant to agreement of counsel below named in West Monroe, Louisiana, on the 2nd day of December, 1975, at the Industrial Relations Building of Olinkraft, Inc., Jonesboro Road, West Monroe, Louisiana by and before Alicia Westbrook, Court Reporter and Notary Public, in and for the Parish of Ouachita, State of Louisiana.

Alicia Westbrook
COURT REPORTER
CERTIFIED NOTARY PUBLIC

TEL. 323-6495
ANSWERING SERVICE 388-0804

100 FREEWAY
WEST MONROE, LA. 71291

APPEARANCES: Mr. Allen Placke, P. O. Box 4092, Monroe, Louisiana 71201
Attorney for the Plaintiff

Mr. Peyton Lacy, Jr. Olinkraft, Inc., P. O. Box 488, Jonesboro Road, West Monroe, Louisiana 71291
Attorney for the Defendant

STIPULATION: It is stipulated and agreed by and between counsel for the parties hereto that the Deposition of Mary Evelyn Clark is hereby taken under Federal Rules for Civil Procedure for the purpose of discovery in accordance with law, pursuant to notice, on Tuesday, December 2, 1975, at the Industrial Relations Department of Olinkraft, Inc. Jonesboro Road, West Monroe, Louisiana, and that all formalities such as signing, sealing, certification and filing are waived; that all objections, save those as to the form of the questions are hereby reserved until such time





as this Deposition or any part thereof may be used or sought to be used in evidence; and that Mrs. Alicia Westbrook, Court Reporter and Notary Public in the State of Louisiana, officiated in administering the oath as to the above named witness.

MS. MARY EVELYN CLARK, the plaintiff, first duly sworn testified as follows:

BY MR. PEYTON LACY, JR.:

Q. Ms. Clark, will you give us your full name please?
A. Mary Evelyn Clark.
Q. And your address?
A. Route 1 Box 214A, Calhoun.
Q. Who is your employer, who do you work for?
A. Olinkraft.
Q. Which plant?
A. Plant 70.
Q. What do they make in Plant 70?
A. Make cartons.
Q. How long have you worked in Plant 70?
A. It'll be twelve (12) years, March the twelfth (12th).

Q. Who is your supervisor, currently?
A. Paul Etier.
Q. Prior to working in Plant 70, did you work in any other plant out here, at Olinkraft?
A. No.
Q. What department do you currently work in?
A. In the Printing Department.
Q. Have you worked in any other department in Plant 70?
A. Yes.
Q. What department was that?
A. The Gluing Department.
Q. And when did you move from the Gluing to the Printing Department, approximately?
A. About '66, probably.
Q. O.K. What is your current job classification?
A. Uh--Press-Operator.
Q. O.K., and are you permanently classified as a Press-Operator?
A. Yes.
Q. What is your current hourly wage scale?
A. Five forty-nine and a half ($5.495).
Q. Now, our records reveal that you have gone through some name changes, if you will just the dates of these changes for me, or the approximate dates, I would appreciate it. Did your name change from Mary Evelyn Wall to Mary Evelyn Clark on about May 21st, of 1973? If my date is incorrect, if you will, give us the





correct date?
A. From Wall to Clark?
Q. Yes ma'am.
A. No, not then.
Q. When was it, do you know?
A. It was April the 2nd--let me see, I have been married two (2) years, in '73.
Q. O.K., and I believe, since you have been employed out here, your name changed from Watson to Wall, prior to that time, is that correct?
A. Yes.
Q. And about when was that? Our records reveal sometime around March the 16th of 1966?
A. That is about right, yes sir.
Q. When were you promoted to Press-Operator?
A. Well, I have been a--uh--just got my raise the eighth (8th), and my three (3) month's raise, so it was three (3) months prior to the eighth (8th).
Q. The eighth (8th) of November?
A. Yes.
Q. So that would be about the eighth (8th) of August, is that correct?
A. Yes.
Q. O.K. What was your wage when you were first promoted to Press-Operator?

A. Well, I couldn't tell you unless I had that Union book.
Q. O.K. Let the record reflect that I am showing her a copy of the Union Contract dated October 1, 1974. I will turn to what I think the right page is, but you be sure and verify that, please ma'am.
A. I would be making four sixteen ($4.16).
Q. O.K. You went into the Operator's classification making four sixteen ($4.16), is that right?
A. Yes, which was the lowest pay for the Press-Operator Helper.
Q Well, are you an Operator, or a Helper, now?
A No. I said that is what I was making before I made the Press-Operator--
Q O.K
A --was four sixteen ($4.16). That was the lowest money on the Press-Operator Helper.
Q. Helper. O.K., and then what did you make after you were promoted, before you got your three (3) months ra'se?
A. Before I get the three (3) months raise?
Q. Yes, as an Operator, from August the eighth (8th), until November the eighth (8th), what did you make per hour?
A. Four ninety-nine and a half ($4.995)
Q. O.K. Thank you very much. Now Ms Clark, I believe you filed a charge against the Company with the Equal Employment Opportunity Commission, did you not?
A. That is right.





Q. Let me show you what I would like the Reporter to mark for identification, Exhibit "1", to your Deposition. Let me ask you if you can identify that for us, please ma'am?
By The Reporter: Clark Deposition One (1)?
By Mr. Lacy: Yes ma'am, please.
Q. It consist of four (4) pages, so if you will look at all four (4) pages, I would appreciate it?
A. Yes, that is what I wrote.
Q. That is a copy of what you wrote, and you either sent that, or carried that to the EEOC in New Orleans, is that correct?
A. Mailed it.
Q. Mailed it to them, O.K. Now, the date on that document is March 5, 1975; is that the date that you filed this?
A. Where do you have a date at?
Q. On the bottom of the first page, in the bottom right hand corner of the first page of the cover sheet.
A. Yes, that would be right.
Q. Now, I believe you testified that prior to working as a Press-Operator, to which you were promoted on August the eighth (8th), that you worked as a Press-Operator Helper, is that correct?
A. That is right.
Q. What machine are you working, as an Operator, on right now?
A. It is called a Number Three (3) Press.
Q. O.K., and is that the one that you have been operating since you were promoted to Operator?

A. No, it is not.
Q. What other machines have you operated since you were an operator?
A. The one they call the Number One (1) Press.
Q. O.K., and so, since August the eighth (8th), you have operated both of those Presses, is that correct?
A. Not since August the eighth (8th).
Q. O.K. Tell me which one you have operated since August the eighth (8th)?
A. Number Three (3).
Q. O.K. Prior to that time, you worked as a Press-Operator Helper--
A Uh-huh
Q --is that correct? How when were you promoted to Press-Operator Helper?
A. Well, I couldn't tell you.
Q. Could you give me a month, and a year?
A. It must have been about November.
Q. Of what year?
A. Of '74.
Q. O.K. If I informed you that the Company's--
A. Or December.
Q. --records show that you were promoted to Press-Operator Helper in about October, early October of 1974, would that change your recollection, or refrash your recollection?
A. I don't think so. I think they are wrong. We were discussing





that earlier. I think they got the dates mixed up. I have got it wrote down.
Q. Where do you have it written down?
A. It would be at my house.
Q. On what type of a document, do you have--
A Oh, it's just my calender
Q. When you were promoted to Press-Operator Helper, did you receive a raise in pay?
A. Yes.
Q. What was the classification you were in prior to being a Press-Operator Helper?
A. Roll-Handler.
Q. O.K., and would you assume that your pay records would show the pay increase that you were given when you went from Roll-Handler to Press-Operator Helper?
A. Yes.
Q. And would that be the correct date that you were given that promotion?
A. It might, I guess.
Q. Then, do you recall that you noticed when you were promoted that you did begin to draw the pay of a Press-Operator Helper, as opposed to a Roll-Handler?
A. Yes, the lowest amount now.
Q. The lowest amount--
A. Yes.

Q. --in the contract? But did that amount--

By Mr. Etier: Which is four-o-eight and a half ($4.085),

--ob--

Q. That amount is the Press-Operator Helpers's hourly wage, as opposed to the Roll Tender's hourly wage, is that correct?

A. Yes.

Q. You started getting that? Now, do you recall what it was, without any help from Mr. Etier, or anyone else?

A. No, I cannot remember all the amounts.

Q. O.K. Now, when were you promoted to Roll Tender, Ms. Clark?

A. That was in October, or--yeah, in October, of 1974.

Q. What was your classification prior to that time?

A. A Feeder-Grabber.

Q. O.K., and again, if I refresh your recollection, would it be more accurate to state that you were promoted on September the eighth (8th), of 1974?

A. That is not right, no.

Q. Again, when you were promoted from Feeder-Grabber to Roll Tender, did your pay increase, your hourly rate increase?

A. Yes, you get a raise every time you get a promotion.

Q. O.K. Would the Company's pay records accurately--do you recall that when you were promoted you begin to receive more money?

A. Yes.

Q. Nobody held back any money on you, at that time?

A. No.





Q. So--

A. I don't suppose.

Q. --the Company's pay records would show exactly the date that promotion was made, is that correct?

A. Yes.

Q. And those would be the most accurate records to indicate that date, is that not correct?

A. I suppose so.

Q. Now, when you became Press-Operator Helper, what machine did you work on as a Helper?

A. On Number Three (3).

Q. O.K., and how long did you serve as a Helper on Number Three (3)?

A. Until I made Press-Operator, I worked on Number Three (3).

Q. O.K., and then you became Operator on Number One (1)?

A. On Number One (1).

Q. As a Roll Tender, what machine were you assigned to?

A. Number Three (3).

Q. Who helped train you as a Press-Operator Helper?

A. Starting out?

Q. Yes ma'am.

A. Well, see, I work with different ones. I think the one that trained me was Jerry Jones.

Q. And what was his job classification?

A. He would be a Press-Operator Helper, too.

Q. On the Number Three (3) machine?

A. Yes.
Q. He trained you on that machine, is that correct?
A. Uh-huh.
Q. O.K. When you became Press-Operator Helper, did you receive any back money, or back pay for the time that you served as a Roll Tender? Was your pay made retro-active for that period of time?
A. Get any back pay?
Q. Yes--
A. No, I did not get no back pay.
Q. --did you receive any lump sum amount that was the difference between your wage as a Press-Operator Helper, and your wage as a Roll Tender?
A. No, I did't get no lump sum.
Q. O.K., did you get any additional money, or did--
A. No.
Q. --you just get your hourly increase?
A. Yes, that is all.
Q. O.K. Now, after you became Press-Operator Helper, Ms. Clark, did you have any occasion to take a leave from the employment of the Company, for any substantial period of time?
A. After I made the Helper?
Q. Yes ma'am.
A. I don't think so, no.
Q. Do you recall that in the spring of 1975, and about March of





1975, that you requested a personal leave of absence--
A. That was after they had put me up to Pressman though.
Q. --for two (2) months? O.K.
A. I wasn't--
Q. That was after you were put up? Is a Pressman and Press-Operator the same?
A. I was training for a Press-Operator, yes.
Q. O.K. You were training for a Press-Operator?
A. Yes.
Q. What wage were you making at that time?
A. Still drawing the Press-Operator Helper's pay.
Q. O.K., and about when was this that you requested that leave of absence?
A. That was in March--yeah, March.
Q. O.K. Would about March 6, 1975, be the correct date?
A. Probably so.
Q. And was that request granted by the Company?
A. Yes.
Q. O.K., and how long was that initial request for?
A. For two (2) months.
Q. That would be sixty (60) days?
A. Uh-huh.
Q. And did you obtain any extension--
A. Uh-huh.
Q. --of that request? And how long an extension did you obtain?

A. About another thirty (30) days.
Q. And, the Company did grant this extension?
A. Uh-huh.
Q. So you came to work on--back to work on, or about June 2, 1975, is that correct?
A. That is right.
Q. You had no problem obtaining that time off from the Company, is that correct?
A. No, I did not.
Q. And this interrupted your training period as a Press-Operator, is that correct?
A. Yes.
Q. You were not there training, obviously, you were away from work during that three (3) months?
A. That is right.
Q. Now, after you were promoted to Press-Operator Helper, Ms. Clark, did you ever have any disciplinary action given you by the Company, for any reason?
A. None that I know of.
Q. Did you ever get called into Mr. Etier's office, and reprimanded for your absenteeism?
A. Well, that was not Mr. Etier then, it was Woody DeJohn.
Q. O.K., and--well, did this occur in fact, did Mr. DeJohn--
A. Yeah, but that wasn't right, also. I never did go ahead and say anything--push it, cause I figured I could not prove it,





but they had it all mixed up; it wasn't right.
Q. O.K. When did this occur?
A. Well, I could not tell you the date of that either.
Q. About December of '74--
A. That is probably about right.
Q. --would that be about right? And you were told that you had been absent more than the allotted amount, is that correct?
A. Yes, that was what I was told--
Q. And you say--
A. --but my record did not show that.
Q. Now, how much did your record show that you had been absent?
A. I had been absent a few days, probably too many, but not enough that they should have gave me a remprimand over;
Q. Do you recall the exact number of absences that your records showed that you had?
A. I think they had one (1) more than I had.
Q. O.K., and do you recall how many that the company records showed that you had?
A. Well, I guess eight (8).
Q. O.K. Eight and a half (8½)?
A Something like--yeah.
Q. Including a tardy? But you were talked to by Mr. DeJohn on that occasion?
A. Yes.
Q. And you accepted this reprimand without defending yourself at

that time, is that correct?
A. It was the only thing you could do.
Q. And it is the only thing you did do, is that correct?
A. Uh-huh.
Q. Now, Ms. Clark, prior to moving into the Roll Tender classification, which I believe you contend happened in October, of '74, is that correct?
A. Uh-huh.
Q. Were you ever given an opportunity to move into the Pressman line of progression by the Company?
A. To the Pressman?
Q. Yes, or to the Press-Operator line of progression?
A. You talking about while I was on--a Roll Handler?
Q. I am talking prior to the time you were a Roll Handler?
A. Oh, no.
Q. Let me show you what I would like to have the reporter mark for identification as Exhibit "1", to your affidavit. It is a document which purports to be a Supplemental Agreement between the Company and the Union?
A. Called the A C Agreement?
Q. It is called the A C Agreement and signed by certain Company and Union officials. Have you ever seen a copy of that agreement before?
A. Not exactly, I haven't, but I know--uh--I haven't really ever read it. It has been read to us.





Q. Who read it to you?
A. I think at the Union Hall.
Q. O.K. Did any Company--did Mr. DeJohn ever read that to you, or show it/you and explain it to you?
A. No, he did not.
Q. Have you ever seen that piece of paper before today, in any spot?
A. This?
Q. Yes ma'am.
A. Yeah, I've seen it before.
Q. Where did you see it?
A. At the Union Hall.
Q. O.K., and who gave it to you at the Union Hall?
A. Well, our Vice-President had a copy of it, at the time.
Q. Who is that?
A. George Dunn.
Q. Uh-huh.
A. And that is where I saw it.
Q. Mr. Dunn showed it to you?
A. He read it to us at the Union Hall.
Q. O.K. When he read it, did you--
A. But I don't have a copy of it--I mean, I have--
Q. --when he read it, did you understand what that document said?
A. Well, not entirely.
Q. What did you understand it to say?

Q. Well, let me ask you if the eight (8), sixteen (16), seventy-four (74), is that August 16, 1974?
A. Uh-huh.
Q. And that is your signature, though, is it not?
A. Yes.
Q. Now, do you recall when you signed that document?
A. Well, it says the eighth (8th) and the sixteenth (16th).
Q. Is that the correct date to the best of your recollection?
A. Yes, that is right--probably about right, but this--it should be torn up and throwed away from what they told us.
Q. Who told you it was supposed--
A. It should not even--
Q. --to be torn up and thrown away?
A. Well, when we took the job and went up on the machine, they said all the job refusals that had to be signed--had been signed prior to this is torn up and destroyed as of now.
Q. Who told you that?
A. Our supervisor did.
Q. Who was that--
A. Woody DeJohn.
Q. --who told you that? And where were you when he told you that?
A. In his office.
Q. Who was there besides yourself?
A. I think another girl named Betty Carpenter was in there.
Q. O.K., and what did Mr. DeJohn tell you on--when was this, to





the best of your recollection? Would it have been on August the sixteenth (16th) that he told you that?
A. No. When we--uh--when we did get the promotion to go up on--as a Roll Handler, or Roll Tender--whatever you call it, anyway they said all the other job refusals would be torn up that was signed prior to that.
Q. O.K. Mr. DeJohn told you that in his office, is that right?
A. That is right.
Q. What else did he tell you on this occasion?
A. Well, I don't know what he told us then.
Q. And, about when was that?
A. Whenever I went up to Roll Tender.
Q. The date that you went to--
A. In October is when I went up, I'm--anyway, that--all the other job refusals that was signed prior to that was torn up.
Q. Roll Tender? O.K., but this one was not, obviously, because you got a copy in your hand--
A. That is right.
Q. --is that correct?
A. But we were told they were.
Q. And you did sign that document--
A. Yes, that is my signature.
Q. --is that correct? Now, calling your attention back to August 16th, of 1974, the day you signed that job refusal, were you in Mr. DeJohn's presence when you signed that thing?

A. Yes.
Q. O.K., and tell us in your own words what happened during that. Was anyone else present? Was Mr. Johnson present, for the Company?
A. No, nobody was in there.
Q. Just you and Mr. DeJohn, is that right?
A. Yes.
Q. O.K. Tell me what was said during that time, or during that meeting with Mr. DeJohn, when you signed that document?
A. This is when he told us to take the Grabbers job, which--which we were already--have a Grabber, just like I put on here. Well, I was already a Grabber, and I felt I should have the next job up, instead of a job I have already got, which I would have to take two and a half cents ($ .025) cut in pay to take this job.
Q. And that is what you told Mr. DeJohn?
A. That is right. Just like I put on there.
Q. So you refused to take the Grabbers job, is that correct?
A. I already had--well--had that job. He just wanted me to take what they got--the man's level and the women--I was already doing that.
Q. Well, did Mr. DeJohn explain to you that that would help you get promoted to Roll Handler, if you took that job?
A. Yes, but I did not feel like I should take it because I was already doing that, and I would have to take a cut in pay.
Q. But he did tell you that that would be, at that time at least,





the way you would be able to get promoted to the next job, which is Roll Tender, is that correct?
A. Well, no, he did not explain all of it--
Q. What did he--
A. --but he just wanted us to take this job.
Q. --explain? And he did not tell you why? I believe you--
A. Well, we knew that already.
Q. O.K., but did you talk about that with him?
A. Oh, yes. We talked about it.
Q. Well, what did he say about it?
A. He said that is the only way, was to take that job, which I was already doing, and take a cut in pay.
Q. The only way for what?
A. The only way you could get anything else, besides Grabbing.
Q. Which would be Roll Tender, is that correct?
A. Uh-huh.
Q. O.K. Now, after--is there anything else you can recall Mr. DeJohn saying in that meeting?
A. No.
Q. And you refused it on the basis that you were already doing the same thing, and you thought that you should go to Roll Tender, is that correct?
A. That is right, and I told him so th...
Q. O K. Now, between that time, the time you signed that document, and the time you went to Roll Tender, about how long was

it?
A. I would say it was in October.
Q. So that would have made it a month and a half, by your best recollection, is that correct?
A. Yes.
Q. O.K. What--in the meantime, are you aware of any men that were promoted to Roll Tender, during that period of time, from August the sixteenth (16th), until October when you were promoted?
A. I am sure it was, cause that--
Q. How are you--
A. --was when we changed and went on another--put on another shift, I am sure there was a lot, but--
Q. --yes, but to know--
A. --I could not tell you their names, yes.
Q. --before you were?
A. Yes.
Q. And how--what makes you so sure? What evidence would show that there were people that did that?
A. Because we had put on another whole shift--you know, working four (4) shifts, instead of three (3)--
Q. Uh-huh.
A. --and it had to be people put up.
Q. O.K. Were you not promoted at that time, when the four (4) shifts went on, to Roll Tender?
A. Yes, I was, but they--I was asked to take the Grabber's job,





but when they did go on four (4) shifts, I did get put up to Roll Tender Relief.
Q. O.K.
A. Roll Tend--Handler.
Q. So, let me see if I have the sequence correct. You were ask to take the Grabber's job on August sixteenth (16th), is that correct?
A. Uh-huh.
Q. And you refused it?
A. Yes, I refused the Grabber's job, right.
Q. On August sixteenth (16th)?
A. Well, that is what this says, August sixteenth (16th), I am sure that is right.
Q. O.K. Then after August sixteenth (16th), sometime, the Company went to four (4) shifts, is that correct? Is that not what you told me?
A. Yes, I think that is about when, but I cannot tell you for sure.
Q. Well, but it was sometime after this?
A. Yes.
Q. Was it after--do you recall that it was after you signed that document that the Company went to four (4) shifts?
A. Yes, I am sure it was.
Q. So, whenever that was, you were promoted to Roll Tender, is that correct?
A. Uh-huh.

Q. Whenever the Company went to four (4) shifts in that plant?
A. I think that was when it was, I could not tell you--
Q. Now, my question to you--
A. --right to the day.
Q. --is, between the time you signed that job refusal, and the time the Company went to four (4) shifts, was anybody to your own knowledge, promoted to Roll Tender, male, female, or otherwise?
A. I do not really know, but I am sure it was, but I could not tell you.
Q. Well, what makes you so sure that it was?
A. Because I refused to take the Grabber's job. I said all time people are going up.
Q. Right, but you were not offered the Roll Tender job, is that correct?
A. No, I was not offered it.
Q. Do you know of anyone who went up to Roll Tender, personally, during that period of time?
A. I could not tell you right now, but I could check. I could not tell you no names.
Q. O.K. Do you have any personal records on who was promoted to Roll Tender?
A. No, I do not have any records.
Q. Well, what do you mean check; who would you check with?
A. I would just have to go back over my--and check who went up





before me. I could ask people, but I could not tell you for sure, right now.
Q. O.K. Is there any document that you know of that would show anyone who went up during that period of time?
A. No.
Q. Prior to the time you did, but you do not know, today at least, of any man that was promoted to Roll Tender after August the sixteenth (16th), but before you were, is that correct?
A. I could not tell you today, no.
Q. Now, during this conversation that you had with Mr. DaJohn when you signed that job refusal, Mr. Clark, did he show you a copy of that Supplemental Agreement that we have attached to your affidavit as Exhibit "2"?
A. No, he did not.
Q. Did he read to you from it?
A. No he did not.
Q. Did he talk to you about it?
A. No, he did not.
Q. Did he tell you that you would be allowed to be promoted on the basis of your Company seniority if you moved into the Grabber classification?
A. No, he did not.
Q. Did you ever become aware of that, that there was an A C Agreement?
A. Yes, I had heard about it, like I said, at the Union meeting

is all.
Q. O.K.
A. I did not really know what it was even.
Q. Did you go to a Union meeting when the union voted on whether or not to accept that agreement?
A. No, I don't think I voted.
Q. But, you recall what month that Union meeting was in--
A. Uh-huh.
Q. --that you went to where it was explained to you?
A. No.
Q. Was it prior to the time you were promoted to Roll Handler?
A. Yes.
Q. How long prior to the time you were promoted to Roll Tender, was the Union meeting you are talking about?
A. I could not tell you.
Q. Was it before, or after you signed that job refusal?
A. That it went into effect?
Q. No, that you went to the meeting and were informed of the A C Agreement?
A. I think it was after this, the Union meeting I went to, that I signed that.
Q. O.K., and when had it gone into effect, the A C Agreement?
A. I could not tell you the date of that either.
Q. Do you know the month?
A. No.





Q. Was the Union meeting the first you heard about it?
A. About the A C Agreement?
Q. Yes ma'am.
A. Yes, I did not know about it.
Q. You did not hear any talk out in the plant about it?
A. Yes, about the meetings,but I did not know anything about that.
Q. Did you hear any talk about the A C Agreement out in the plant?
A. Yes, I guess I did.
Q. Well, did you listen to it?
A. Not really.
Q. So, you had no knowledge until the Union meeting you went to, when George Dunn read that piece of paper to you, about--of the A C Agreement, and what it really was, is that correct?
A. Yes, I did not know what it really was, no.
Q. Well, what did you know about it if anything?
A. I told you, all I know about it--that we was going to have a right to go up on the--on the machines, instead of just Grabbing.
Q. And when did--
A. And that we could use our Company seniority. Now, I--
Q. --when did you find that out, from Mr. Dunn?
A. Yes, from George.
Q. Did you find it out prior to that time?
A. Prior to what time?
Q. The time Mr. Dunn told you about it?
A. Well, I don't reckon. That is how I found out about it, was

from him.
Q. Where were you--where was that Union meeting held, where George talked to you?
A. Well, George now, did not read it at the Union Hall. The President read it at the Union Hall.
Q. O.K. Where did George tell you about it?
A. George brought a copy of it at work, but I did not ever read it.
Q. O.K. Did--but he told you what was in it,--at work, is that correct?
A. Yes, he told everybody.
Q. And he had a copy there with him--
A. Yes, he had a copy--yes
Q. --for you?
A. --but we did not, ourselves.
Q. Could you--and he told you what was in that copy that he had?
A. Well, he did not just tell me everything that was in it, no.
Q. What did he tell you--he told you that you could use your Company seniority, was not that your testimony?
A. Yes.
Q. O.K., and he told you that it meant you would be allowed to move into new jobs--
A. Uh-huh.
Q. --is that correct? Now, did you ask him could you read it?
A. No, I did not.
Q. Did you believe what he was saying was true?





A. Yes, I believed him.
Q. And was this before or after the time you signed that job refusal?
A. That I seen the A C Agreement?
Q. No, that George was talking to you, had a copy of it--
A. Well, I could--
Q. --out in the plant?
A. --I could not tell you, but I am sure it was afterwards.
Q. How long afterwards?
A. I could not tell you that either.
Q. A few days?
A. I do not really know.
Q. You do not have any best recollection; was it, you know, a matter of weeks, or days, or months?
A. I could not really tell you.
Q. Now, prior to that job refusal on August 16, 1974, had you ever signed other job refusals, to go into any jobs, with the--
A. Yes, I did.
Q. --Company? O.K. What was the one you signed--about when was the one you signed immediately prior to that one that you have in your hand?
A. I could not tell you the date, but it is the same thing as this one right here.
Q. All right.
A. Because I was already doing that job.

Q. O.K., and who--
A. You are not suppose to have a copy of it now, I know.
Q. --do you recall what year that that was?
A. No, I do not.
Q. Would 1972 be correct?
A. Probably so, yes, cause it was a few years back, but that was tore up also.
Q. O.K. By tore up, you mean that the Company promised--
A. They told us that they destroyed all the job refusals that had been signed when that A C Agreement went into effect, that they destroyed all the job refusals, and they did not even have them any more.
Q. O.K. Was not, in fact, what they told you, that they would not use them anymore--
A. No, they told us they tore them up.
Q. --for purposes of promotion? But, whether you have one or not, you did sign one in about 1972?
A. I sure did.
Q. And who was present when you signed that one--
A. Woody DeJohn.
Q. --was it Mr. DeJohn? Your name then was Mary Wall, is that correct?
A. Uh-huh.
Q. You received a copy of that job refusal yourself?
A. Yes, I did.





Q. Do you have one at home?
A. I do not really know, I would have to check.
Q. O.K., and that was an opportunity to go to the Crabber classification, is that correct?
A. Uh-huh.
Q. And, why were you offered the opportunity to go to the Crabber classification, at that time, in 1972?
A. Why?
Q. Did Mr. DeJohn tell you why?
A. Well, I guess for the same purpose he did this one.
Q. Well, what is that?
A. So you could go up on the machines, but like I told you, the same thing then, that I was already a Crabber.
Q. O.K.
A. And I wanted the next job.
Q. O.K. What did the contract, at that time in 1972, say? Could you go from Feeder-Crabber to Roll Tender at that time, under the contract of the Union?
A. It was not on the contract like that, no, but it should have been.
Q. But, at any rate, it was not, is that correct?
A. Uh-huh.
Q. So you knew that if you refused to go to the Crabber job, that you could not go to Roll Tender, is that correct, under the contract?



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A. Under the contract, yes, which was not right.
Q. Regardless of what was right, or wrong, you knew that when you refused the job, is that not correct?
A. Yes.
Q. You could have--you knew that you could have gone to the Grabber job and then gone up in the line of progression?
A. Yes, take a cut in pay, yes.
Q. But, because you did not think it was right, you refused to do it?
A. Yes, it was not right.
Q. What was the cut in pay?
A. Two and a half cents ($ .025).
Q. Per hour?
A. Yes.
Q. O.K. How does an employee find out, Ms. Clark, what are they shown that shows them when they get a raise--wage increase?
A. How do we find out?
Q. Yes.
A. Just when you get your check the next week.
Q. Shows up on your check stub?
A. Yes, they do not show that they got a raise, you just have to figure it out yourself, and know how much you are going to make that week.
Q. O.K. You ever see any time cards that they keep their--your time on, that have the wage rate written on the top of the time





card?
A. Yes, if you go in there in the office and look at them.
Q. Have you ever done that?
A. Yes, if you have time. Some days you do not have time to do that.
Q. O.K. But, you would know if you saw one of those cards, that it would have the correct wage rate at the top of it, that you made?
A. Yes, except that they do not change it sometimes. You gotta go in there and remind them.
Q. O.K. Referring you to your EEOC charge, Ms. Clark, which is Exhibit "1" there, if you will turn to the second page of that. You say that you have never been allowed in the line of progression, during the time you have worked here, is that correct?
A. What now?
Q. You say in your charge, the second sentence, that you have never been allowed in the line of progression since you have worked here, is that correct?
A. Yes, I did the same job all the time I have worked here, that is right.
Q. I believe you have testified that in August of 1974, that Mr. DeJohn offered you a chance to get in the line of progression, is that correct?
A. You talking about this job refusal right here?
Q. Yes ma'am.

A. Yes, doing the same job I was already doing, that is right.
Q. But you were aware at the time you refused it that that job would have allowed you to have been promoted to the next classification, if you had taken it, instead of refusing it, were you not?
A. Yes, but I was already doing that job, I wanted the next job, is what I am get--trying to say.
Q. O.K., and I believe that you also testified that in 1972 you refused to make the same type of job transfer, is that correct?
A. Yes, the same way as this one right here.
Q. O.K., but you did know at that time, as well, that if you moved to the Crabber classification, then you would get the next vacancy, or a vacancy, in the Roll Tender classification, did you not?
A. Yes, I knew that.
Q. O.K. Now, do you know when the A C Agreement went into effect?
A. I could not tell you the date, no sir.
Q. Would you look at Exhibit "3"? Does that indicate what date that that was effective?
A. August 12, 1974.
Q. Do you have any reason to believe that that is not the correct date?
A. No, I don't.
Q. In your charge you say you ask/go to the Roll Stand, and were refused, so you went to the Union--





A. Uh-huh.
Q. --and the Union helped you get into the Roll Stand classification, is that correct?
A. No. What I ask first of all, was that the Union to file a grievance. I was told that I did not have any grounds.
Q. O.K. What do you mean when you say in your charge that after the Union talked to the Company, you were put on the Roll Stand?
A. Well, they were suppose to, cause I was told, first of all, I did not have any grounds to file a grievance.
Q. O.K. Who told you that?
A. My Vice-President.
Q. Who was that?
A. George Dunn.
Q. O.K., and what hap--when was that that George Dunn told you that?
A. When this--when I was ask to go to the Crabbing job, right here.
Q. About August sixteenth (16th), is that correct?
A. Yes,
Q. O.K., and what happened then, after George told you you did not have a grievance?
A. Well, then I was asked to go on the Roll Stand, a little while later.
Q. O.K. What makes you think that the Union talked to the Company about this?
A. Well, that was suppose to been what happened

Q. Who told you that was suppose to be what happened?
A. George Dunn.
Q. And what did he tell you? He told you you did not have a grievance, but what did he---
A. Yes, that is what he told me first of all.
Q. --that is the bad news, right?
A. Yes.
Q. Now, what did he--what was the good news?
A. That I could go to the Roll Stand.
Q. O.K., and how long was that after you signed that job refusal, that you went to the Roll Stand?
A. Now, I said it was in October, but I cannot tell you the date, because I don't have nothing to show you.
Q. O.K. You do not have any record of exactly when?
A. No, I do not.
Q. So your pay records would be the best evidence of when that happened?
A. That is right.
Q. Or your personnel files? Would you expect that that would be reflected in your personnel file?
A. I guess, if it is right.
Q. Now, how long did you work on the Roll Stand before you went to assistant Press-Operator?
A. I could not tell you.
Q. That is Helper, excuse me. I think we refer to it as Helper.





A. Yeah.
Q. But at rate, how long did you work on the Roll Stand, before--
A. I could not tell you exactly.
Q. --what would be your best extimate?
A. Probably about three (3), four (4) weeks.
Q. Now, during the time you worked on the Roll Stand, are you aware of any men that were promoted to Helper ahead of you?
A. No, it was not at that time.
Q. There wasn't, at that time, you are certain of that?
A. I am sure, yes.
Q. O.K. After you became Assistant Press-Operator, I believe that was on the Number Three (3) Press, right?
A. Uh-huh, right.
Q. Press--Helper, and before you became Operator on the Number One (1) machine in August of '75, are you aware of any men who went to Operator ahead of you?
A. While I was still--
Q. While you were Helper?
A. There was one went up, but I do not know whether it was right then, or not, before me.
Q. Who was that?
A. That L. V. Thompson.
Q. O.K. Did he stay up?
A. No, he went back also.
Q. O.K. How long ahead of you did he go up to Operator?

A. I do not know--
Q. Is that what you are telling me, that he went up to Operator ahead of you?
A. Yes.
Q. Did he have more Company seniority, or less?
A. Less.
Q. O.K., and how much ahead of you did he go up, how many weeks, how many days?
A. I do not know.
Q. Well, you are familiar--
A. It was while we was on--we had went on four (4) shifts, and we did not stay on it too long, and he went up to--uh--Press-Operator, and then we went back off of it again, you see.
Q. How long--
A. And then the next time we went up, well, I went up, instead of him.
Q. O.K. The time he went up instead of you, about when was that--
A. It was when we went on the four (4) shifts, whenever that was. I cannot tell you the date.
Q. --do you know? Well, you were working as a Helper at the time?
A. Uh--no, I don't guess I was. I do not really know. I know he went up before I did.
Q. Went up to what, now You said that you do not know of any man who went to Helper ahead of you, while you were working on the Roll Stand, that is what I understood you to say, is that





correct?
A. Uh-huh.
Q. Then, in either October, November, or sometime, you went, you say about a month after you are on the Roll Stand, you went to Helper?
A. Yes.
Q. So, after you went to Helper, was any man promoted to Operator, when you should have been promoted to Operator?
A. Well, I couldn't tell you the dates of when they was put up, but they were put up before me. I cannot tell you if that was while I was Helper, or not.
Q. Well, when else would it have been, that you are talking about?
A. I guess it was when we went on the four (4) shifts, because they promoted people.
Q. Whenever they went on the four (4) shifts?
A. Uh-huh.
Q. What job did you hold when they went on the four (4) shifts?
A. I guess that was--that must have been when I went up to the Roll Stand.
Q. O.K. You went to the Roll Stand--
A. Yes.
Q. --is that correct?
A. Yes.
Q. When they went to four (4) shifts?
A. Yes.

Q. Now, after you went on the Roll Stand, but before you went to Helper, you said several times, that no man was promoted to Operator, I mean to Helper ahead of you, during that period of time, is that correct?
A. Not that I know of.
Q. O.K. Now, what I want to ask you about is after you became Helper. Do you remember becoming a Helper?
A. Yes.
Q. And you got a raise in pay?
A. Yes.
Q. Pretty big deal, huh?
A. Yes, the lowest pay.
Q. The lowest pay?
A. Yes.
Q. But more pay than you had before?
A. Yes.
Q. O.K. After that time do you know of any man who was promoted to Operator ahead of you?
A. Well, I think it was, while I was still--well, I know--
Q. What makes you think that?
A. I cannot remember--I--I do not really know.
Q. Could you give me a name of who you think it was?
A. I said that L. B. I was working as a Helper, and he was Operating, I remember, because he was training me.
Q. He was training you as an Operator?





A. And I was working as a Helper.
Q. O.K., and he was training you for what job?
A. For Press-Operator.
Q. O.K. Do you know what his job classification was at that time?
A. Well, if he was training me, he would have to be Press-Operator.
Q. But do you know what he was?
A. Yes, Press-Operator.
Q. O.K, and how long did he train you for?
A. Until I took the leave. I was working on his machine, on Number One (1) Press
Q. And he was working as the Operator and you were working as the Helper?
A. Uh-huh.
Q. And he was training you?
A. Uh-huh.
Q. I believe you say someone in your--somewhere in your charts, that one of your complaints was that the man that was training you was a person whose job you would be taking, is that the Mr. Thompson that you are talking about.
A. That is who I am talking about, yes.
Q. O.K., and did you, in fact, take Mr. Thompson's job, after you were trained, after you came back from your leave of absence?
A. Yes.
Q. O.K.
A. He went back to Assistant, yes.

Q. And that was based on your Company seniority--
A. Uh-huh.
Q. --is that correct? Now, besides this incident with Thompson, do you have knowledge of any other man that was promoted to Operator while you were a Helper?
A. Yes, I think there was another one--
Q. What is his name?
A. --but I am not sure when he was put up--uh--I cannot tell you his first name. His name is Bowen.
Q. O.K. Does he have more Company seniority than you?
A. No, he has less.
Q. O.K. How do you know that?
A. I have been working there longer.
Q. And when do you think he was put up?
A. At the same time that L.B. was.
Q. And when was that?
A. I do not know the date.
Q. Well, was that--is that when the Company went on four (4) shifts, that you are talking about.
A. Uh-huh.
Q. So, whenever the Company went on four (4) shifts would be the date which--
A. Uh-huh.
Q. --if we know that, we would know the date that you are talking about--





A. Uh-huh.
Q. --that these men went to Press-Operator, is that correct?
A. Uh-huh.
Q. Now, at the time that the Company went to four (4) shifts, what was your job classification?
A. The first time? I was a Grabber.
Q. The first time?
A. Yes, that--
Q. You were a Grabber?
A. --was when I got put up first.
Q. O.K., and you went to Roll Tender, is that correct?
A. Yes.
Q. At that particular time were you qualified to be a Press-Operator?
A. No, I was not.
Q. Regardless of your seniority, you could not have run any Press, is that correct?
A. No.
Q. But since the time that you were trained and qualified, has any man been promoted ahead of you who had less Company seniority?
A. Right now, you talking about?
Q. I am talking about since you were qualified to run the Press. Since you had been trained in the Roll Tender and the Helper classification?
A. Has anybody went ahead of me?
Q. Yes ma'am.

A. No.
Q. Thompson went ahead of you when you were a Roll Tender, not when you were a Helper, is that correct?
A. I think I was a Helper?
Q. You think you were a Helper?
A. Yes. I could not tell you the dates though.
Q. But whenever it was, it was when the Company went on four (4) shifts?
A. Yes, I guess.
Q. And I think you testified that you were a Roll Tender. You had just gone to Roll Tender at the first time the Company--
A. Yes, but I did not work there very long, that is what I am saying.
Q. O.K But the first time the Company went to four (4) shifts, you went to Roll-Tender, is that correct?
A. I guess that is when it was.
Q. And is that the same time that Thompson went to Operator?
A. I guess if was.
Q. And was that the same time that Bowen went to Operator?
A. Uh-huh.
Q. And since that incident, whenever it was, no man with less Company seniority than you has been promoted to any job ahead of you, is that correct?
A. That is right.
Q. And since, whenever your pay records reflect that you were





promoted to Roll Tender, you have been promoted ahead of everybody, male and female in that department, have you not?
A. That I have more Company seniority than, yes.
Q. You are charge--you do not charge in this lawsuit that the Company has violated that Agreement that is attached to your affidavit as Exhibit "2", do you?
A. What are you talking about?
Q. I am talking about the A C Agreement?
A. No, I did not say that, why?
Q. O.K. I was just asking you.
A. Yes.
Q. You are satisfied that the Company has abided by that Agreement as far as you are concerned, since it has been in effect, is that correct?
A. I suppose so.
Q. Now, I believe you testified that you had an old reprimand from Mr. DaJohn concerning your attendance in about December of '74, is that correct?
A. Uh-huh.
Q. And you had a three (3) month leave of absence while you were working as a Helper in the spring of '75, is that correct?
A. That is right.
Q. Now, prior to that time had you ever had any other disciplinary action for your attendance, Ms. Clark?
A. I think so, but I could not tell you when.

By Mr. Lacy: Will you mark this as Number Four (4) please ma'am?

By The Reporter: Yes sir.

Q. I want to show you what is marked as Exhibit "4" to your Deposition, please ma'am, and ask you, is that your signature that appears on that document?

A. Yes it is.

Q. What is the date on that document?

A. The first (1st), the twenty-fifth (25th), and seventy-three (73).

Q. That is January 25, 1973?

A. Seventy-two (72), or three (3). It has got '72 down here. I cannot tell what is up there.

Q. What does it look like to you, where the date issued, is that a '72 that has been changed to a '3?

A. Yes, somebody has wrote over it.

Q. Do you recall receiving this document, or signing this document?

A. Yes, I do.

Q. What is it? Describe for us on the record, please ma'am.

A. Excessive absenteeism.

Q. What action was taken against you for your absenteeism on that occasion?

A. Got three (3) days off.





By Mr. Lacy: Mark this as Number Five (5) please ma'am.

By The Reporter: O.K.

Q. Let me show you what we have marked here as Exhibit "5", to you Deposition, please ma'am. Is that your signature that appears on that document?

A. That is mine.

Q. Did you sign it?

A. Yes, I did.

Q. On the date that it is marked as issued, April 3, 1972?

A. I guess.

Q. And, what is that for? What type of discipline is it? What offense did you commit to receive it?

A. Excessive absenteeism.

Q. O.K. What type of discipline was given to you, at that time?

A. There was a written reprimand.

Q. O.K.

By Mr. Lacy: Will you mark that as, what are we on Six (6)?

By The Reporter: Yes.

Q. Let me show you Number "6", Ms. Clark, please. Is that your signature that appears on that?

A. Uh-huh. Yes, it is.

Q. O.K., and that is dated August 4, 1971, is that correct?

A. Uh-huh.

Q. What is the reason that you received this disciplinary action notice?
A. It says excessive absenteeism.
Q. And what action was taken on this occasion?
A. There is a written reprimand.
Q. O.K. Now, other than the leave of absence that you have told us about, that you took in the spring of 1975, have you ever--have you recieved other leaves of absence from the Company?
A. Since I have been working there?
Q. Yes ma'am.
A. Yes.
Q. Do you recall that you have received a personal leave of absence in 1970?
A. Uh-huh.
Q. O.K. Do you recall how long that leave of absence was for?
A. Sixty (60) days.
Q. And do you recall about what months those were, that you were off during?
A. No, I do not.
Q. Would about February to March, or early April be approximately correct?
A. I do not really know.
Q. O.K. During the period at the end of 1970, in November, and going into 1971, did you take a personal leave of absence during that period of time?





A. I guess I did, if it is down there. I do not remember.
Q. O.K. Well, maybe this will be easier. How many leave of absences besides the one (1) in 1975, have you taken from the Company.
A. Two (2) that I know of.
Q. O.K., and one (1) of them, I believe you testified, was in 1970, is that correct?
A. Probably.
Q. And that was for sixty (60) days, is that correct?
A. Uh-huh.
Q. Was the other one (1), in 1969?
A. I do not remember that one (1).
Q. O.K. What two (2) do you remember?
A. I just remember the--when I was on a maternity leave, and that other leave of absence. I cannot remember another one (1).
Q. When was the maternity leave?
A. In '65.
Q. O.K., and when did you come back to work from the maternity leave?
A. When?
Q. Yes ma'am. Sixty-six ('66), were you off '65 and '66, or --
A. No, I was not off but about six (6) months.
Q. O.K., and that was in about '65?
A. Uh-huh.
Q. And you do not recall any other--

A. No, that was after then, when I took the maternity leave.
Q. O.K., but regardless of when that was, you recall taking a leave of absence for personal reasons in 1970, right?
A. Yes.
Q. And you recall taking one (1) in 1975?
A. Uh-huh.
Q. O.K. Do you recall taking one (1) in 1969?
A. No, I do not, but I guess I did, if it is down there.
Q Let me show you what purports to be a request for a leave of absence dated January 15, 1969, and ask you if that is your signature that appears on it?
A. Yes, it is.
Q. Does that refresh your recollection that you were granted a leave of absence during that period of time?
A. Yes, that--that is my signature.
Q. Does that document indicate that the leave of absence is approved, that you were allowed to take it?
A. Yes, I guess I took that one (1). I just did not remember it.
Q. So that--you had--how long was this request for, Ms. Clark?
A. Must have been sixty (60) days.
Q. O.K. Does it say on the face of that document?
A. Just says starting January the twenty-seventh (27th), that was all..
Q. O.K. January 27, of '69, is that correct, and you do not recall --you do not have any recollection of that--





A. I just said I did not remember taking it, but I guess I did.
Q. --other? Let me show you what purports to be your request, which is dated November 2, 1970. . Is that your handwriting, and your signature?
A. Yes, it is.
Q. Would that then be the evidence of the one (1) that you were talking about that you took in 1970?
A. Yes, it is.
Q. And that document says it is a sixty (60) day leave of absence, is that correct?
A. That is right.
Q. And does that document indicate that it was approved for sixty (60) days?
A. Yes, it has got approved on it.
Q. Let me call your attention again to your EEOC charge, if I might, that you have in your possession as Exhibit "1". O.K. on the third (3rd) page of that document, which is the second (2nd) page of your writing, the first paragraph on that page says there was a reduction in force, and several people got laid off and others got bumped back. Could you give me the approximate date that that occurred?
A. What do you mean?
Q. Excuse me, this second (2nd) paragraph---
A. Oh, that is when they went off of the four (4) shifts, when they was--what I was talking about.
Q. O.K., and what job were you working in at that time?

A. That is when I--I must have been Assistant Press-Operator.
Q. O.K.
A. And that is when they put up the people. I see I have got four (4) down there, so it must have been four (4), instead of L. D., and Bowen.
Q. O.K. When was that, if you--you were Assistant Press-Operator there?
A. Yes, that is right.
Q. So, it was after November, October, or whenever you were?
A. Well, I cannot tell you the date.
Q. But, did you get bumped back from Assistant Press Operator on that occasion?
A. No, I did not get bumped back.
Q. O.K. Now, you say the Company put four (4) men to Press-Operator, when things picked up. Who were these four (4) men you are talking about?
A. Well, which ever one (1) was the four (4) lowest. It would be L.B., and Bowen, but I cannot tell you who the other two (2) is.
Q. O.K., and you went to the Union? Is that the conversation you were talking about, that you had with George Dinn?
A. Yes, now that is the one--you know when I did not get put up as Operator.
Q. O.K.
A. That is when he told me I had no grounds, that is right.
Q. And you were working as a Helper at that time, is that correct?





A. That is right.
Q. And Bowen and Thompson, when business picked up, went to Press-Operator, is that correct?
A. Uh-huh.
Q. How long did they work as Press-Operator?
A. Before they came back to me?
Q. Yes.
A. It was in the same week.
Q. O.K. So, the period of time in which they were ahead of you was less--a week, or less, is that correct?
A. Uh-huh.
Q. And after this period of time, of less than a week, or a few days, you were put up to Press-Operator?
A. Yes, I was training.
Q. O.K.
A. Still making Press-Operator Helper's pay.
Q. O.K., but at least one (1) of these four (4) men came down--
A. No they did not.
Q. --because of your Company seniority?
A. No.
Q. What happened to them?
A. They stayed where they was at.
Q. Had they worked as Press-Operators before?
A. No, they had not.
Q. Before the roll back?

A. No.
Q. You are positive of that?
A. No, L.B. had not, I know.
Q. O.K., now, when did this occur? Was this in September of 1974?
A. Well, I could not tell you the date.
Q. O.K. The Company's records will show the date, is that correct?
A. Yes.
Q. O.K. Now, referring you to the last page of your charge with the EEOC, Ms. Clark, you say you feel like you have been deprived of a lot of money, before you were put up to Press-Operator, what do you mean by that?
A. Well, if I had been put up before, I would have been making what I should be making right now, which I am not.
Q. O.K., but--O.K., what should you be making right now?
A. I should be making top Operator's pay, which I am not.
Q. For what reason?
A. Well, if I had got put up when I should, I would have been making--you have to be up two (2) years before you make top Operator's pay.
Q. O.K. When should you have been put up to Press-Operator?
A. Well, I should have went up just like my Company seniority was.
Q. How could you have been put up to Press-Operator when you refused to go into the Grabber classification when you were out there?
A. Because I was already a Grabber.





Q. O.K., but under the Labor Agreement, was there anyway that you could have gotten to Press-Operator without going through the Grabber classification at that time, in 1972?
A. What now?
Q. In 1972, when you were offered to go into the Grabber classification, did you not know at that time there was no way you could ever become a Press-Operator unless you did that?
A. Did I not know it?
Q. At that time? Did you not know that?
A. Yes, but that is what I already was. I did not see taking a job two and a half cents ($ .025) cut in pay when you already was doing the same thing.
Q. O.K You did not see that you may have been promoted on to Press-Operator much sooner if you had, in fact, accepted that job?
A. No, I did not see it that way.
Q. O.K., but you knew that was the case, you just disagreed with it, is that not the truth?
A. Yes, O.K.
Q. Regardless of what the contract said, or anyone else, is that not correct?
A. Yes, I did not agree with it.
Q. The same thing in August of 1974, when you were asked to do the same thing, you knew what the consequences were, but you just decided you did not want to do it for your reasons, is that not

correct?

A. I told the reasons, it is wrote down.

Q. So, tell me the reasons today?

A. Because I felt like that I was already a Grabber, and I wanted the next job.

Q. But, again, you knew that you could not go to Press-Operator unless you took that Grabber job, did you not?

A. Well, I guess I knew it.

Q. Well, it was written in the contract was it not?

A. Yes.

Q. All right. You knew what the contract meant, did you not.

A. Uh-huh.

Q. And, again, I believe it was your testimony today that since the time you made Roll Tender, you are not aware of any men who were promoted ahead of you to either Press-Operator Helper, or to Press-Operator?

A. Yes, there was--there was, just like that last page we was just reading--

Q. O.K.

A. --about the four (4) was put up when I was still Helper--

Q. O.K.

A. --there was.

Q. O.K. When was that?

A. It was when they went back on the four (4) shifts, after they had been off of it--you know, stayed off about a couple of





months, then they went back on it.

Q. O.K. Was that not in August, or September of 1974?

A. I do not know the date.

Q. O.K. Was it prior to the time the Number Four (4) machine started up?

A. Uh-huh.

Q. Was it before or after you signed that job refusal to Grabber?

A. What--you mean--

Q. The time those four (4) men were--

A. Yes, it was after them.

Q. --the time they went to four (4) shifts?

A. Yes.

Q. O.K. Was it before or after you were a Roll Tender?

A. It was after.

Q. After you were a Roll Tender?

A. That the men went up to Operator?

Q. That the four (4) shifts begin operating?

A. Oh, that must have been when I went up the first time--you know, when I first went up on four (4) shifts.

Q. Must have been when you went up to what?

A. To Roll Tender--Roll Handler, whatever you---

Q. O.K., and that was the same time that Thompson and B[illegible]n went to Press-Operator, is that correct?

A. No, it is not.

Q. O.K. When did they go to Press-Operator? Why don't you describe

it for me then, Ms. Clark, exactly what happened after you went to Roll Tender; to yourself and to everyone else.

A. Well, I think you are trying to get me mixed up. I cannot--

Q. No ma'am, I am trying to get you to tell me what your best recollection of the truth is. I have no interest in you being confused. I want to know what the facts are. It is very important to me to know what the facts are, and what the truth is. That is why I am going to all this trouble. So I want you-- if you need a little break to re-construct it, or, you know, if you need some time, or you know, a drink of water, or what you would like--whatever. Then I want you to tell me, from the time you went to Roll Tender exactly what has happened to you at Olinkraft since August or September, or when--October, according to you, of 1974.

A. Well, when I went to the Roll Stand, well, then, we went on four (4) shifts then; and we went back off of it again, somewhere around Christmas time, and then we went back on it; and when we went back on, that is when I was still Assistant--uh--Helper, just a Helper.

Q. Uh-huh.

A. And then they put the four (4) up to Pressmen, ahead of me, you see.

Q. O.K. They put the four (4) men up, including Thompson and Bowen to Pressmen ahead of you?

A. Yes.





Q. O.K.

A. That is right.

Q. And how long did Thompson and Bowen and the other two (2) men stay up in that job ahead of you?

A. Well, they stayed. They went ahead and put me up.

Q. Well, is Thompson a Operator now?

A. Yes.

Q. O.K. Is Bowen an Operator now?

A. Uh-huh.

Q. O.K., and you are an Operator now?

A. Uh-huh.

Q. So, Thompson and Bowen, when they went back to four (4) shifts, went on up to Operator, and what happened to you?

A. They put me up as training.

Q. Training on the Operator?

A. Yes.

Q. At that time were you qualified to be an Operator?

A. No, I was not.

Q. O.K. So, even regardless of your Company seniority, you could not have run the machine if they had ask you to, is that correct?

A. Uh-huh, that is right.

Q. You had to be trained before you could assume those jobs, and Mr. Thompson I believe trained you, did he not?

A. Uh-huh.

Q. O.K.

A. The first one he did.
Q. At that time, if they had ask you to take the job what would you have had to reply?
A. I would have took it.
Q. As Operator?
A. Yes.
Q. Even though you could not operate the machine, as you just testified that you could not operate the machine.
A. But I would have still took the job. I could--did just as good as the rest of them. They did not know how to operate it when they went up.
Q. O.K.
A. They trained everybody.
Q. O.K. Well, and that is what they told you they were going to do to you, is train you, is that not correct?
A. Yes, I went up in training.
Q. O.K., and that is what the other people had done at sometime in the past, right?
A. That is right.
Q. So, at the time this occurred you were not, I believe you testified that you were not qualified to operate the machine, is that correct?
A. What do you mean?
Q. At the time Bowen and Thompson allegedly went up ahead of you, if that is true, you were not qualified to be an operator?





A. Well, they was not either. They trained them.
Q. When did they train them?
A. Well, I could not tell you when they trained them, the days, but they trained them to be an Operator.
Q. O.K., and they were training you to be an Operator, just like they had trained them, is that not correct?
A. That is right.
Q. Do you have any reason to feel that you should have been promoted to Operator on that date?
A. The date that they put them up?
Q. Yes ma'am.
A. By Company seniority, I should have been.
Q. Whether you were qualified to run the machine or not.
A. That is right.
Q. Have you ever known of anyone else that had been promoted to Operator without being trained on the machine?
A. They do not--they--
Q. I do not know--I am not talking about how well they do, I am talking about without going through a training process?
A. Nobody has been promoted without being trained.
Q. And you had not been trained, at that time, is that correct?
A. No, but they could have been training me like they did the others.
Q. Now, when are you talking about they could have been training you?

A. Before we went up on the four (4) shifts.
Q. O.K.
A. They let some of the others train to be, so they would already know how, you know.
Q. When was that?
A. Before we went on the four (4) shifts.
Q. The first time, in September, is that correct? That is when those men were trained, is it not?
A. No, I think you are wrong.
Q. Well they trained--
A. After we went up--
Q. --were you working as a Roll Tender while they were training?
A. I cannot tell you, you are trying to get me mixed up again.
Q. No ma'am, I am trying to get the facts, because I cannot tell what you are telling me. I am asking you were you working as a Roll Tender. Were you working as a Grabber or Roll Tender when those men were trained, or do you know when they were trained?
A. No, I really do not.
Q. You do not know?
A. I must have been Assistant though, when they was training these other guys.
Q. Well, what makes you say you must have been?
A. Well, that is when they went up, and I was Assistant then.
Q. O.K. They went up when you were Assistant?





A. That is right.
Q. O.K., but you do not know when they were trained, is that correct? Did you observe them being trained while you were an Assistant?
A. Oh, yes.
Q. What machine were you on as an Assistant?
A. On Number Three (3) Press.
Q. O.K., and was anyone being trained to operate Number Three (3) Press while you were an Assistant?
A. I do not think so.
Q. O.K. Do you--how many presses are there?
A. Four (4).
Q. O.K., it was Number Four (4) operating at that time when you were an Assistant?
A. No.
Q. Well, so, at that time there were three (3) presses?
A. Uh-huh.
Q. And you were working on Number Three (3)?
A. Uh-huh.
Q. And noone was being trained on that press while you were a Helper, is that correct?
A. For Press-Operator?
Q. Yes ma'am.
A. No, I do not think so.
Q. O.K. What about the Number Two (2) machine, do you know whether

or not anyone was being trained to operate that machine, at that time?

A. I think Bowen was.

Q. O.K. What about the Number One (1) machine, do you know if anyone was being trained to operate that machine?

A. L. B. Thompson.

Q. O.K., and this was while you were a Helper, that these men were being trained?

A. Yes.

Q. You sure it was not while you were a Feeder-Grabber?

A. No, it would not have been then.

Q. You are positive? O.K. Now, Ms. Clark, do you--are you aware of/seniority list that the Company keeps and posts on the bullentin board by the time clock?

A. Yes, I am aware of it.

Q. Do you periodically check those list to see what seniority is kept for you?

A. I looked at one recently, yes.

Q. O.K., and what is on those seniority lists?

A. What?

Q. Yes ma'am.

A. It just says what--how long you have been working in that department, and over here it has got how long you have been there with the Company.

Q. Does it also list how long you have been working in the job





that you are working in?

A. I think it does. It lists what job you was o.. at the time that was put up, yes.

Q. O.K., and how long you had been working in that job?

A. Yes, I guess it does.

Q. Does it have job seniority across the top of it?

A. I really do not know what it has got across the top of it.

Q. But you would recognize--

A. I just--

Q. --one, or a portion of one if you seen it?

A. --looked at it. Yes.

Q. It also has a code on it that tells who is a female and who is a black A C, and who is a female A C, right?

A. Uh-huh.

Q. Let me show you what purports to be part of a seniority list for the Carton Plant 70, which is dated November 21, 1974. Will you turn to the third (3) page of that particular document. Do you find your name appearing on the third (3) page of that document?

A. This has just got number two (2), it ain't got no third (3).

Q. I am sorry, including the cover sheet.

A. O.K.

Q. O.K., on the second (2nd) page.

A. Yes, I do.

Q. O.K., and what job classification are you listed as being in

at that time?
A. Just Operator Helper.
Q. O.K., and what is your job seniority date as Press-Operator Helper?
A. It says the ninth (9th), and the eighth (8th), and seventy-four (74).
Q. And that is September 8, 1974?
A. That is what it has got on here.
Q. O.K. Have you ever seen that seniority list before, or checked that one?
A. Well, not close up. I glanced at it the other day, one like this.
Q. Well, I am talking about that one that was listed in November or that was posted in November?
A. What do you mean, did I look at it?
Q? Yes, have you ever looked at that one?
A. No, I never paid any attention to it really.
Q. O.K., but at least--are those sent to the Union Hall, also, to your knowledge?
A. I do not know.
Q. Are the--do the employees know that they are suppose to check their seniority on that to see if if is correct? Do you know that you are suppose to check that, and if you have any problems--
A. No, I do not know that I am suppose to check it.





Q. O.K., well, has anybody ever told you that that list reflects the seniority the Company is using, and if you do not agree with it for some reason, that you ought to--you know take a look at it, and make sure it is right?
A. No, nobody never told me to look at it, and check it, and see if I was where I oughta be, or--
Q. Well, do you know, Ms. Clark, that that is the seniority the Company goes by for you? Do you know that that is what that list is for?
A. I guess. I did not even know they had one of these. I do not pay any attention to all the stuff on the bulletin board.
Q. I thought you just recently checked one, is that correct?
A. Yes, just--just the last day I worked, yes.
Q. You know that those are up there, and anybody can look at them that wants to, is that correct?
A. Yes.
Q. O.K. What does--what Company seniority does that list that you have in your hand have for you, if you will look at it please ma'am?
A. What--oh--when I started?
Q. Yes ma'am.
A. The third (3rd), the twelfth (12th), and sixty-four (64).
Q. Is that correct?
A. Yes, that is right.
Q. That is March 12, 1964?

A. Uh-huh.
Q. And what department seniority do they have for you?
A. They have got the sixth (6th), and the twelfth (12th), and sixty-four (64).
Q. Is that correct?
A. I could not tell you that.
Q. And what division seniority does it have for you?
A. You talking about the job?
Q. Well, or--what--there are four (4) kinds on that are there not?
A. Of the--
Q. We have gone over company and department, is there not a division seniority?
A. Division, the third (3rd), the twelfth (12th), and sixty-four (64).
Q. O.K., and the job is September 8, '74, is that correct?
A. Uh-huh.
Q. Now, referring you to that sheet, do you see the name of Mr.-- do you have any reason to suspect that September 8, '74, is not the job seniority date that is proper for you?
A. No, but I just say I do not think it was in September though. I thought it was in October. Just what I thought.
Q. O.K. What about that seniority list you checked the other day, did it have September 8, '74, as your job seniority?
A. This?





Q. No, the one you checked the other day?
A. At work?
Q. Yes ma'am.
A. I guess it had the same thing this has got on it, but I did not really look.
Q. Well, of course, no, you are a Press-Operator now, so it would have had a different one, right?
A. I have not seen one with me Press-Operator on it, no.
Q. O.K. Will you look for Mr. L. B. Thompson's name on that?
A. Yes, he is listed under Press-Operator.
Q. O.K., and what is his job seniority date?
A. The nineth (9th), the seventeenth (17th), and seventy-four (74).
Q. That is September 17, 1974, is that correct? Now, what were you working as on September 17, 1974? Were you working as a Helper, or were you working as a Roll Tender, or a Feeder-Grabber, or what?
A. Well, I guess I was working as a Helper.
Q. O.K. When had you been promoted to helper, if that was actually the case?
A. The date I could not tell you.
Q. O.K., but I think you have in your hands as Exhibit "#3", I believe I am making the correct reference, a job refusal that says you refused to go to Grabber on August 16, '74, is that not correct?
A. That is right.

Q. And then that list reflected Mr. Thompson was promoted to Operator on September 17, 1974, is that correct?
A. Uh-huh.
Q. That is a period of a month, is that not correct?
A. Yes, it is.
Q. Assuming that you were promoted to Helper on September 8, 1974, would you have been qualified ten (10) days later, or nine (9) days later, when Mr. Thompson was promoted to become an Operator?
A. I could have been trained.
Q. I am asking you a very specific question. Were you qualified if a vacancy occurred on September 17, '74, would you have been qualified to fill that at that time?
A. No, I would not have been qualified, but he was not either.
Q. How do you know that he was not?
A. Well, he had never worked as a Press-Operator.
Q. Had he been trained, or do you know?
A. I do not know.
Q. O.K. Judging by your experience that you testified to, a moment ago, it is very possible that he had been trained, is it not?
A. That is right, uh-huh.
Q. And that was prior to the Company A C Agreement, or soon after the Company A C Agreement?
A. Uh-huh.





Q. How long did you train as a Press-Operator?
A. Well, I started when I took the leave, you see, When I come back, I still had to train.
Q. How long did they keep you training?
A. About three (3) months, something like that.
Q. Before a vacancy occurred, is that correct?
A. Before a vacancy occurred?
Q. Yes, where you could get promoted to Operator. I mean you trained for at least three (3) months before you were promoted to Operator?
A. Yes.
Q. Will you look for Mr. Bowen's name? The Mr. Bowen you have mentioned.
A. Bowen, yes.
Q. O.K. what is his job seniority date?
A. The ninth (9th), and the sixteenth (16th), and seventy-four (74).
Q. That would be September 16, is that correct?
A. Uh-huh.
Q. Were you qualified on that date to be a Press-Operator?
A. No, I was not.
Q. Would you say after reviewing those seniority lists, after looking at those seniority list that those are the correct date that those men were promoted as a permanent Press-Operator?
A. Well, I guess it is correct. I mean, I could not tell you it

was.

Q. O.K. You have any knowledge, or any idea that it might have been another time, that that is not--

A. No.

Q. --a proper list?

A. I do not know.

Q. Therefore the--in the testimony you have given about when they went off four (4) shifts, and went back to four (4) shifts, these men would have already been Press-Operators at that time, when you were a Helper, is that not correct? Assumming that happened in January or February of 1975?

A. Yes, they were already, once before, right.

Q. O.K. So they would have gone back to their permanent job classification, is that correct?

A. Yes, they went back to the same thing I was.

Q. O.K, and at that time, were you qualified to be a Press-Operator?

A. Was I?

Q. Yes ma'am.

A. No, I had never worked as a Press-Operator.

Q. O.K., so you were not trained at that particular--coming back up after the lay-off?

A. No.

Q. O.K. Let me show you another portion of the seniority list in that plant that is--what is the date on the cover sheet of that please ma'am?





A. The ninth (9th), the nineteenth (19th), and seventy-five (75).

Q. O.K., and what were you--turn to--turn through it and fine your name.

A. I have not ever seen this one before.

Q. Do you see your name there?

A. Yes, I see my name, I just--

Q. O.K.

A. --this is the first time I have ever seen it though.

Q. O.K., and what classification are you in on that--

A. Press-Operator.

Q. And what date does it list for your promotion, your job seniority?

A. The eighth (8th), the ninth (9th), and seventy-five (75).

Q. O.K., and what date does it list for your Company seniority?

A. The third (3rd), the twelfth (12th), and sixty-four (64).

Q. O.K. Do you see Mr. Thompson's--is that date correct for your Company seniority?

A. Yes it is for the Company seniority, but it is not for the job seniority.

Q. What makes you say that it is not for the job seniority?

A. Well, I was still training, I did not get classified I told you 'til just three (3) months ago. I just got my raise on the--for three (3) months just last week.

Q. I thought you said you got it on November the eighth (8th), is that not correct?

A. No, on December the eighth (8th), I mean, what is this?
Q. Well, today is December the second (2nd)--
A. Right, I got my--
Q. --so that would be--
A. --whatever--I have got it wrote down on a piece of paper that I can show you.
Q. O.K., and you testified a moment ago that it was November the eighth (8th).
A. Was it the eighth (8th)? I cannot tell you, you done got me so confused about these dates, but I have got it wrote down.
Q. O.K., but counting back, assuming that date is correct, if you counted back three (3) months from November the eight (8th), what date would you have?
A. What now?
Q. If you counted back from November the eighth (8th), back three (3) months, what date would you have on--
A. September.
Q. Well, would it be September, or would it be August?
A. October--uh--
Q. Well, you go November, then one (1) month would be October, going backwards, right?
A. Yes.
Q. Two (2) months would be September the eighth (8th)?
A. Uh-huh.
Q. Three (3) months would be August the eighth (8th), is that





correct?
A. Yes, (inaudible).
Q. So that date is correct for your current job seniority?
A. I guess so.
Q. Well, is it August the eighth (8th), is that the date that it has for you?
A. I would have to look, I do not have a date with me.
Q. Well, look on that piece of paper and see if it says August the eighth (8th) for your job seniority. That is what I am asking you.
A. It says the ninth (9th).
Q. O.K. August the ninth (9th)?
A. Uh-huh.
Q. And assuming that you got your three months raise on November the eighth (8th)--
A. Or the ninth (9th), maybe it was the ninth (9th).
Q. --or the ninth (9th), that would be three (3) months, is that correct?
A. Yes.
Q. Will you look at Mr. L. B. Thompson's name on that sheet please ma'am--
A. Uh-huh.
Q. --what job seniority is listed for him?
A. The ninth (9th), and seventeenth (17th), and seventy-four (74).

Q. That is the same as was on the other seniority sheet, is it not?
A. I guess it was.
Q. Well, let me show it to you please ma'am?
A. Uh-huh, it is the same.
Q. And what about Mr. Bowen?
A. The ninth (9th), the sixteenth (16th), and seventy-four (74).
Q. O.K. Those are the same dates that are listed for them on the seniority list that is dated September 19, 1975. Those dates appear to be accurate, is that correct? You know of no reason or--
A. No, I do not.
Q. --that they would not be accurate? And I believe you testified that they are posted for the employees to see on the bulletin board, are they not?
A. I guess, I have never seen this one, but it might be there.
Q. O.K. You said you looked at one (1) when, your last day at work?
A. Yes, the one I seen though, is this one.
Q. O.K. Which one is that? Look at the date on it and describe it.
A. It says the eleventh (11th), the twenty-first (21st), and seventy-four (74).
Q. The one you saw and you were not classified as a Press-Operator?
A. No, not the one I seen.
Q. O.K. Now, we got a--your testimony got a bit confusing, Ms.





Clark, about the events you described as happening in February or so of 1975, where a certain four (4) men, according to you, had been--there had been some lay-backs, and then there was a pick up and we went on four (4) shifts, and certain four (4) men, including Mr. Thompson and Mr. Bowen went to Operator, while you remained as Press-Operator. Do those seniority lists and the dates on those seniority lists refresh your recollection that those men, in fact, had been Operators prior--permanent Operators prior to February of 1975?
A. They was not permanent Operators, they got set back, the same thing I was.
Q. O.K. They was set back because there just weren't that many Operators?
A. Yes, they was classified as the same thing I was.
Q. O.K. They were classified in a lay-off, a temporary lay-off situation, is that not correct? Was that--will you speak up?
A. Yes, I got--
Q. That February was a temporary lay-off was it not?
A. It was a lay-off. I do not know if you call it temporary or not.
Q. O.K. Well, it did not last very long, I believe?
A. No .
Q. How long did it last?
A. About two (2) months I guess.
Q. O.K., and then when it ended, these men, Bowen and Thompson,

went back to Press-Operator?
A. Uh-huh.
Q. That is your testimony?
A. That is right.
Q. Now, again, to try to eliminate that confusion, and showing you the seniority lists, dated November 21, 1974, and referring you to Mr. Bowen and Mr. Thompson's name, that is B-o-w-e-n, Bowen, is it not--
A. Bowen, yes.
Q. --that you are talking about. O.K. Their job seniority dates are September 16th and 17th of 1974, are they not?
A. Yes.
Q. That would indicate, would it not, if that is in fact, accurate that they were permanently promoted to Press-Operator on that date?
A. Yes, I guess that is what it means.
Q. So they were promoted ahead of you at that time, when you were a Helper?
A. Yes, I was a Helper when they got promoted.
Q. Promoted ahead of you? O.K. but at that time, on those two (2) dates, September 16th and 17th, how long had you been a Helper?
A. I do not know.
Q. No longer than a month according to your job refusal, is that not correct? Which is dated August the sixteenth (16th).





A. Yes, that would be right.
Q. Could not be longer than a month?
A. Uh-huh.
Q. So, based on those documents I think you have testified that you, at that time, in September would not have been qualified to operate a Press, is that not correct?
A. No, I was not qualified.
Q. And you had not been trained?
A. But I was not offered the job either.
Q. I have no further questions, I don't believe. Let us take about five (5) minutes and make sure. You testified for a couple of hours about, to the best of your recollection, what happened on all these occasions, Ms. Clark. In your complaints you say that the Company is paying males with less seniority than you, a greater salary for performing the same work. What do you mean by that?
A. What do I mean?
Q. Yes ma'am.
A. Well, just some of them doing the same job I am is making top Operator pay and I am not.
Q. O.K. I believe you explained a minute ago that your theory is that if you had been promoted to Operator two (2) years, or more ago, that you would be drawing the same pay, is that correct?
A. That is right.

Q. O.K. The Union contracts requires, the Agreement between the Company and the Union, requires that only certain---that you have to work in a job so long to get certain pay, is that not correct?
A. That is right.
Q. You are making no contention that people--males who have been there the same, or less time in the job with you, are making more money than you or/given some big advantage over you, monetarily are you?
A. That what?
Q. There is nobody that was promoted in August, no male that was promoted in August that is making more money than you?
A. No--No.
Q. I mean you are not alledging that the Company is violating the contract, and giving more money to people that they want to, who are male?
A. No, I am not saying that.
Q. You are just saying if you had been promoted in '73, as opposed to '75, that you would be getting top wage?
A. Well, yes.
Q. Now, what do you want the court to do for you about that? What do you think that the courts should do?
A. What do you mean, "What they should do?" I just think I should be making--
Q. You filed a lawsuit.





A. --top Operator's pay right now.
Q. So you think the courts should enter a order saying that you should get top Operator's pay?
A. Yes, I think I should be getting top Operator's pay right now.
Q. O.K. On the basis that you were not promoted?
A. As--
Q. Back in 19--
A. --my Company seniority, yes.
Q. --on the basis you were not promoted back in 1973, is that correct?
A. Well, whenever I should have been.
Q. Whenever you should have been; according to you, that was at least, maybe before '73, but at least by '73?
A. Yes.
Q. O.K., and you say that we continue to promote, or Olinkraft continues to promote to better paying jobs men who have less seniority than you, or, you know, as a female. Now, has that happened to you since the first of September of 1974?
A. That somebody has been promoted around me, you mean?
Q. Yes ma'am.
A. No, they have not.
Q. To a job--Since 1974, at least, you have been promoted by Company seniority and you have been promoted ahead of everybody, male and female, is that not correct?
A. Since the first job, yes. Since I got to the Roll Stand, I

have been promoted like I should.

Q. O.K.

A. Except the one time.

Q. Except in February?

A. Yes, whenever it was.

Q. There is still some bone of contention about that? I think your testimony is clear that you--at that time you were not qualified to run the Press, is that not correct?

A. Yes, but other people was not qualified too.

Q. Now, what was you--what do you expect the courts to do about that? What would you ask the court to do for you and for--that has not been done for you in that A C Agreement that you have as Exhibit "#2"?

A. I do not--what do you mean--I do not think I--I am making as much money as I should be making.

Q. O.K. What about promotions? I understand your position on the money. What about promotions, what would you expect the court to do for you that has not been done for you in that A C Agreement?

A. I do not know what you are talking about, but I think I should have been promoted before I was, if that is what you are talking about.

Q. O.K. I understand that, but what about today? The court can only issue an order today, and what should that say about promotions? Should you have more rights than you have under that A C Agreement--





A. No, I just think I should have been promoted--

Q. --in regards to promotion?

A. --before I was.

Q. So, what you would like the court to say is that you should have had that A C Agreement in 1973, or 1970, or sometime--1964, when the Civil Rights Act was passed?

A. Well, if that is what you--the way you look at, it should be way back there.

Q. I want you to tell me, see, I am curious about what you expect to achieve by this litigation, and I do not know?

A. Yes, we should have had an A C Agreement long time ago, you are right.

Q. O.K., and that is what you would like the court to say, is that you should have had one a long time ago?

A. That is right.

Q. But in regard to promotions, at least in the past year, or since you made Roll Tender, you have no complaint that you are trying to raise in this complaint?

A. Just one (1).

Q. O.K., and what one (1) is that?

A. The one (1) where they were promoted ahead of me.

Q. Regardless of whether you were qualified?

A. That is right.

Q. And regardless of whether those men had been working as Roll Tenders since September of 1974, when you were still a Helper,

and not qualified at that time to become an Operator?
A. What?
Q. Strike that, I --is there anything else you can think of that you would like to--that the courts do for you, or order for you, if you go to court and win?
A. Well, I cannot tell you right now, I do not know what--
Q. Well, just take your time and think. You have plenty of time. I am not trying to confuse you, I'm just trying to ask you in very plain layman terms what do you want--what do you want the court, or the Company to do?
A. I feel like I should be making the money, that I ought to be making.
Q. O.K., that you should be making top wages?
A. And I feel like I should be paid the money that I wasn't making.
Q. O.K., what does that mean? Explain what you mean by that.
A. Well, if I'd been promoted when I should, I'd be making the money--top operators pay right now, which I've lost money all --through all the jobs, because ever job I went to, I took the lowest amount of pay.
Q. And when should have you been promoted, when are you saying that you should have been promoted?
A. By job seniority.
Q. Right, but when--when should you have been promoted?
A. Well, I can't tell you, I'd have to get the seniority list





and see when I should have.
Q. But wait, I think your testimony is way back?
A. Yes.
Q. When, by Company seniority,---
A. Yes.
Q. --whenever that would have allowed you to be promoted, is that correct?
A. Yes.
Q. O.K. At least since the time that George Dunn showed you that A C Agreement, and talked to you on the job, which I think you testified was around the time you signed that job refusal, is that correct?
A. That is right.
Q. At least since that time, you have been aware that women who were covered by that agreement have been given greater rights than they had prior to that, have you not?
A. Yes, they have been given their rights to--
Q. And you knew it when George talked to you in August of 1974?
A. That we were going to have the right--you know--
Q. Yes, under that A C Agreement? I have no further questions, I don't think. Thank you ma'am.

STATE OF LOUISIANA

PARISH OF OUACHITA

I HEREBY CERTIFY that the above and foregoing pages numbered one (1) to eighty-seven, both inclusive, contain a true and correct transcription of my Edison record of the testimony of Ms. Mary Evelyn Clark, the plaintiff, called on behalf of defendant whose deposition was taken pursuant to above stipulation in the suit styled above pending in the United States District Court, Western District of Louisiana, Monroe Division, as taken and transcribed by Alicia Westbrook, Court Reporter and Notary Public for the Parish of Ouachita, State of Louisiana, at the Industrial Relations Building of Olinkraft, Inc., Jonesboro Road, West Monroe, Louisiana, on the 2nd day of December, 1975.

IN TESTIMONY WHEREOF I sign hereto this the 4th day of December, A. D., 1975.

Alicia Westbrook

ALICIA WESTBROOK, COURT REPORTER, AND NOTARY PUBLIC, PARISH OF OUACHITA, STATE OF LOUISIANA.

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Respectfully submitted,

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Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-923

OLINKRAFT, INC.,
Petitioner

versus

MARY EVELYN CLARK,
Respondent

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-923

OLINKRAFT, INC.,
Petitioner

versus

MARY EVELYN CLARK,
Respondent

## STATEMENT OF THE CASE

The respondent, Mary Evelyn Clark, was employed by the petitioner, Olinkraft, Inc., on March 12, 1964, as a feeder-grabber in its paper mill operations. On October 1, 1974, a period in excess of ten years from the date of her employment with petitioner, the respondent was finally promoted from feeder-grabber to the position of roll handler.[1] A settlement of charges filed under Title VII of the Civil Rights Act of 1964, as amended, against petitioner by female employees alleging sex discrimination in petitioner's pay and promotion policies was entered into on December 12, 1974 (Appendix I, pages A-64-72).[2] The respondent

1. Petitioner contends the date of respondent's initial promotion from feeder-grabber to roll handler was September 8, 1974.

2. Petitioner contends the "AC" agreement was "effective" on August 12, 1974, although said agreement was not signed until December 12, 1974, apparently solely because the agreement contained a provision that it be considered effective as of August 12, 1974.

was not a party to this settlement and received no funds as did the other female employees to compensate her for petitioner's past discriminatory practices. On March 5, 1976, the respondent filed a written charge under oath with the Equal Employment Opportunity Commission in which she alleged that she suffered injury by the defendant because she had been denied job promotions and pay on the basis of her sex. In a written decision dated July 23, 1975, the Equal Employment Opportunity Commission did not find reasonable cause to believe that respondent had been discriminated against by the petitioner in violation of the Civil Rights Act of 1964. On October 7, 1975, the present action was brought in the United States District Court for the Western District of Louisiana.

The respondent specifically alleged in her complaint that for some time prior to the Spring of 1964 and for some period of time thereafter, the petitioner had an established policy or practice of promoting to better paying jobs over qualified females, males with less seniority, and of paying females a lesser salary than males performing the same job. The respondent also alleged in her complaint that during the period from March 12, 1964, to October 1, 1974, a period in excess of ten years, the petitioner continued to promote from feeder-grabber to roll handler numerous males with less seniority than the respondent, a qualified female. The respondent also specifically alleged in her complaint that during this period males with less seniority than respondent were paid a higher salary than respondent for performing the same job. Additionally, the respondent specifically alleges that the unlawful employment practices of the petitioner have not ceased by virtue of the fact that the petitioner continues to promote to better paying jobs males with less seniority than the respondent who is qualified for such better paying jobs. Further, the petitioner also continues to pay males with less seniority than the respondent a greater salary for performing the same job as respondent.



The petitioner moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted under 42 USCA § 2000-5(e) because "all allegation of the complaint are based on facts and events which occurred more than one hundred eighty days prior to March 5, 1975, which was the date of the filing of her charge of employment discrimination with the United States Equal Employment Opportunity Commission." See Motion to Dismiss. The motion to dismiss was granted by the trial court.

The respondent appealed the decision of the trial court to the United States Court of Appeal for the Fifth Circuit. On August 4, 1977, a three judge panel of the Fifth Circuit, Judge Coleman dissenting, reversed and remanded the judgment of the trial court. Contrary to the assertions of petitioner before the Fifth Circuit and in its Statement of Facts contained in its petition, and as found by the Fifth Circuit, there were material facts in dispute in the instant case, as set forth in respondent's opposition to the petition for a writ of certiorari, infra.

## OPPOSITION

The decision of the three judge panel of the Fifth Circuit in reversing the trial court was correct and the petitioner's request for the granting of a writ of certiorari should be denied for the reasons set forth below:

A. The United States Court of Appeal for the Fifth Circuit correctly found that the respondent's complaint stated a cause of action upon which relief could be granted such that such complaint was not barred by Section 706(e) of Title VII of the Civil Rights Act of 1964.

B. The United States Court of Appeal for the Fifth Circuit correctly found that if the lower court dismissal order was viewed as a summary judgment, there existed a critical disputed factual question concerning acts of discrimination which precluded the entry of summary judgment.

C. The decision of the United States Court of Appeal for the Fifth Circuit does not conflict with the decision of this Honorable Court in *United Airlines, Inc. v. Evans*, 431 US 553, 52 L. Ed. 2d 571 (1977), the recent decisions of other panels in the Fifth Circuit in the cases of *McMonigle v. Delta Airlines, Inc.*, 556 F.2d 1261 (5th Cir. 1977) and *Cutliff v. Greyhound Lines, Incorporated*, 558 F2d 803 (5th Cir. 1977), or the recent decisions of other panels in other circuits.



## ARGUMENT

### A.

The United States Court of Appeal for the Fifth Circuit correctly found that the respondent's complaint stated a cause of action upon which relief could be granted and was not barred by Section 706(e) of Title VII of the Civil Rights Act of 1964.

It is well settled that where the alleged unlawful employment practice is continuous in nature, the failure to file a complaint with the Equal Employment Opportunity Commission within 180 days after the unlawful employment practice occurred does not constitute a bar to the suit under 42 USCA §2000(e) et seq. *Gamble v. Birmingham Southern Railroad Company*, 514 F.2d 678 (5th Cir. 1975); *Palmer v. General Mills, Inc.*, 513 F.2d 1040 (6th Cir. 1975); *Rich v. Martin Marietta Corporation*, 522 F.2d 333 (10th Cir. 1975). In the instant case, as found by the Fifth Circuit, the respondent does not simply contend that the "AC" agreement between the United Paperworkers International Union, Local No. 654, and petitioner does not remedy the effects of past discrimination, but also that discrimination in promotion and pay constitutes a continuing and unlawful employment practice in violation of Title VII.

In the trial court, the petitioner contended that the failure to promote does not constitute a continuing violation and heavily relied on the failure to hire cases which held that the failure to hire did not constitute a continuing violation. See *Collins v. United Airlines, Inc.*, 514 F.2d 594 (9th Cir. 1975) and *East v. Romaine, Inc.*, 518 F.2d 332

(5th Cir. 1975). The argument that the principles applicable in a failure to hire case are applicable in a failure to promote case has been clearly rejected in *Rich, supra*. The Court in *Rich* commented on the failure to promote as follows:

> "We finally must take up the factor of timing. The Court found that in some instances there were no openings in positions for which the plaintiffs were qualified within the 90 days prior to the filing of charges with the EEOC. The court apparently read *McDonnell-Douglas* as saying that if an employer has employed no one during the 90 days preceding the filing of charges with the EEOC, it is impossible to have an unlawful employment practice committed within the time limitations of 42 U.S.C.§ 2000e-5(e).
>
> This is in relation to the *McDonnell-Douglas* criterion requiring that plaintiff show that he applied for a job for which the employer was seeking applicants. *Clearly this applies to new employment and is different from an employee who is seeking promotion. The former takes place on a particular day, whereas in the promotion area it invariably arises during a lengthy period of time. Plaintiffs here challenge the entire promotion system maintaining that it continually operated so as to hold them in lower echelons. Hence, the 90 day period prior to the filing of the EEOC charges looms inconsequential in this kind of case.* If proven, these charges of discriminatory refusal to promote would be violative of 42 U.S.C. §2000e-5." *Id.* at 348. (Emphasis added.)



As found by the Fifth Circuit, the respondent's allegations are sufficient to toll the running of the one hundred eighty day period in Section 706(e) of Title VII of the Civil Rights Act of 1964.

Assuming *arguendo* that the respondent's only claim related to the continuing effects of past discrimination, the respondent's action is still not time barred. The respondent specifically alleged in her complaint that during the period from March 12, 1964, to October 1, 1974, the date respondent was promoted to roll handler, the petitioner continued to promote from feeder-grabber to roll handler numerous men with less seniority than respondent and during this period men with less seniority than respondent were paid a higher salary for performing the same job. Thus, whether the date of respondent's promotion was October 1, 1974, or September 8, 1974, as contended by petitioner, there was clearly a failure to promote respondent within the 180 day statutory period prior to the respondent filing her charge with the Equal Employment Opportunity Commission.

B.

The United States Court of Appeal for the Fifth Circuit correctly found that if the lower court dismissal order was viewed as a summary judgment, there existed a critical factual question concerning acts of discrimination which precluded the entry of summary judgment.

In its oral argument before the Fifth Circuit, the petitioner contended that viewed as a summary judgment, the respondent's only possible claim was that the continuing effects of past discrimination make her filing timely and that

even if this theory might be valid in some circumstances, petitioner's agreement with the Union provides full relief and thus, the theory has no validity in the instant case. However, as aptly pointed out by Judge Wisdom in the majority opinion, the question of whether or not the Union agreement provides full relief must be determined initially by the district court. No such determination has yet been made. *Franks v. Bowman Transportation Company*, 424 U.S. 747, 47 L.Ed. 2d 444 (1976).

Additionally, there exists a critical disputed factual question concerning the active discrimination that continued beyond the alleged effective date of the agreement with the Union. The respondent repeatedly stated in her deposition that even after the alleged effective date of the agreement, men with less company seniority than her were promoted ahead of her. (Appendix J A-132-134, 142, 143) As a result, summary judgment was inappropriate.

The argument of the petitioner that the respondent had been properly promoted based on her company seniority to all jobs which she was qualified to perform is without merit. Respondent testified that several males with less company seniority than her were promoted to positions ahead of her (Appendix J A-132-134, 142, 143) Obviously, the "catch" as pointed out by respondent was that in order to qualify for a position, one had to be trained by petitioner. As evidenced by her deposition, the petitioner chose to train and thus "qualify" for a better paying job, males with less company seniority than respondent. The argument that respondent was treated fairly because she was promoted to all positions which she was "qualified" to perform is both hollow and specious. See *Gamble v. Birmingham Southern Railroad, supra.*



C.

The decision of the United States Court of Appeal for the Fifth Circuit does not conflict with the decision of this Honorable Court in *United Airlines, Inc. v. Evans*, 431 U.S. 553, 52 L.Ed. 2d 571 (1977), the recent decisions of other panels in the Fifth Circuit in the cases of *McMonigle v. Delta Airlines, Inc.*, 556 F.2d 1261 (5th Cir. 1977) and *Cutliff v. Greyhound Lines, Incorporated*, 558 F.2d 803 (5th Cir. 1977), or the recent decisions of other panels in other circuits.

In *United Airlines, Inc. v. Evans, supra*, the plaintiff was a stewardess who had been terminated in 1968 when she was married pursuant to United's discriminatory policy of refusing to allow its female flight attendants to be married. On February 16, 1972, she was hired as a new employee, and for seniority purposes, she was treated as though she had no prior service with United. The plaintiff filed sex discrimination charges against United in February of 1973.

This Honorable Court found that United's discriminatory termination of plaintiff in 1968 was a specific act taking place on a particular day. Thus, plaintiff had ninety days from her termination by United to file a charge of sex discrimination with the Equal Employment Opportunity Commission under the period then allowed by Section 706(d). Plaintiff's failure to file such a charge within the applicable time period allowed United to treat the past act of termination as lawful and she could not toll the applicable period by alleging solely that the effects of the prior act are not remedied in the existing seniority system. The Court clearly pointed out that in this case, the plaintiff did not allege in her complaint that the existing seniority system treated

female employees differently from male employees.

In the instant case, the respondent was not terminated, but rather simply not promoted and kept at a lowly pay scale due to the sexually discriminatory policies of petitioner. While the failure to hire or the termination of an individual takes place on a particular day, the failure to promote invariably arises during a lengthy period of time. Each day the respondent was not promoted in the instant case constituted a separate act of discrimination. Although there is a dispute as to the date of respondent's initial promotion from feeder-grabber to roll handler, whether the date of promotion be September 8, 1974, or October 1, 1974, there was a failure to promote within the applicable period for filing a charge of discrimination since the charge was filed with the Equal Employment Opportunity Commission on March 5, 1975.

Additionally, as aptly pointed out by the Fifth Circuit, the respondent, unlike Evans, contended not only did the "AC" agreement between the Union and Olinkraft not remedy the effects of prior discrimination, but also that discrimination in promotion and pay continued and constituted an unlawful employment practice in violation of Title VII. The instant case is clearly distinguishable from *United Airlines, Inc. v. Evans, supra.* The Fifth Circuit correctly found that respondent's claim was not time barred.

The recent decisions of the Fifth Circuit in *McMonigle v. Delta Airlines, Inc., supra,* and *Cutliff v. Greyhound Lines, Incorporated, supra,* are distinguishable from the instant case. In *McMonigle,* the plaintiff was terminated by Delta in 1967 when she became pregnant pursuant to company



regulations. No effort was made by plaintiff to seek reinstatement until 1973, six years later. When Delta refused to rehire plaintiff, she filed a charge with the Equal Employment Opportunity Commission on December 14, 1973. The Court correctly found that the charge was not timely filed since it was not brought within the applicable 90 day period from the date of her termination in 1967. The Court further pointed out that although other former married stewardesses were reinstated the law does not say that one female must be uniformly given the same treatment accorded some other female or group of females.

In *Cutliff, supra,* the Fifth Circuit addressed the question of continuing discrimination in a footnote. The case was decided on jurisdictional grounds, the Court finding that the plaintiff did not prove that he had filed any charges against the employer with the Equal Employment Opportunity Commission. The two sentence comment in footnote 5 of the opinion concerning continuing discrimination was mere dicta.

The instant case does not involve a failure to hire or a discriminatory termination or a failure to apply for employment due to discriminatory policies that took place years ago,[3] but rather a discriminatory failure to promote over a period in excess of ten years. Additionally, the respondent, unlike the plaintiffs in the cases cited by the petitioner, contended not only did the "AC" agreement between the Union and Olinkraft not remedy the effects of prior discrimination, but also that discrimination in promotion and pay continued and constituted an unlawful employment

3. See *DeGraffenreid v. General Motors,* 558 F.2d 480 (8th Cir. 1977) and *Cates v. Transworld Airlines,* 561 F.2d 1064 (2d Cir. 1977).

practice in violation of Title VII, a point on which exists a critical factual dispute. The decision of the Fifth Circuit in the instant case is correct and does not conflict with the other decisions cited by petitioner.

## CONCLUSION

The decision of the United States Court of Appeal for the Fifth Circuit in reversing the trial court was correct and the writ of certiorari should properly be denied.

Respectfully submitted,

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BY: _____
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ATTORNEY FOR
RESPONDENT, MARY
EVELYN CLARK



## CERTIFICATE

I hereby certify that three copies of the above and foregoing Opposition to Petition for Writ of Certiorari has been this day forwarded to petitioner's counsel of record, Peyton Lacy, Jr., by mailing same to him, postage prepaid, to P.O. Box 488, West Monroe, Louisiana 71291, and to G. Phillip Shuler, by mailing same to him, postage prepaid, at 1500 First N.B.C. Building, New Orleans, Louisiana 70112.

Monroe, Louisiana, this 19th day of January, 1978.

_____
OF COUNSEL.